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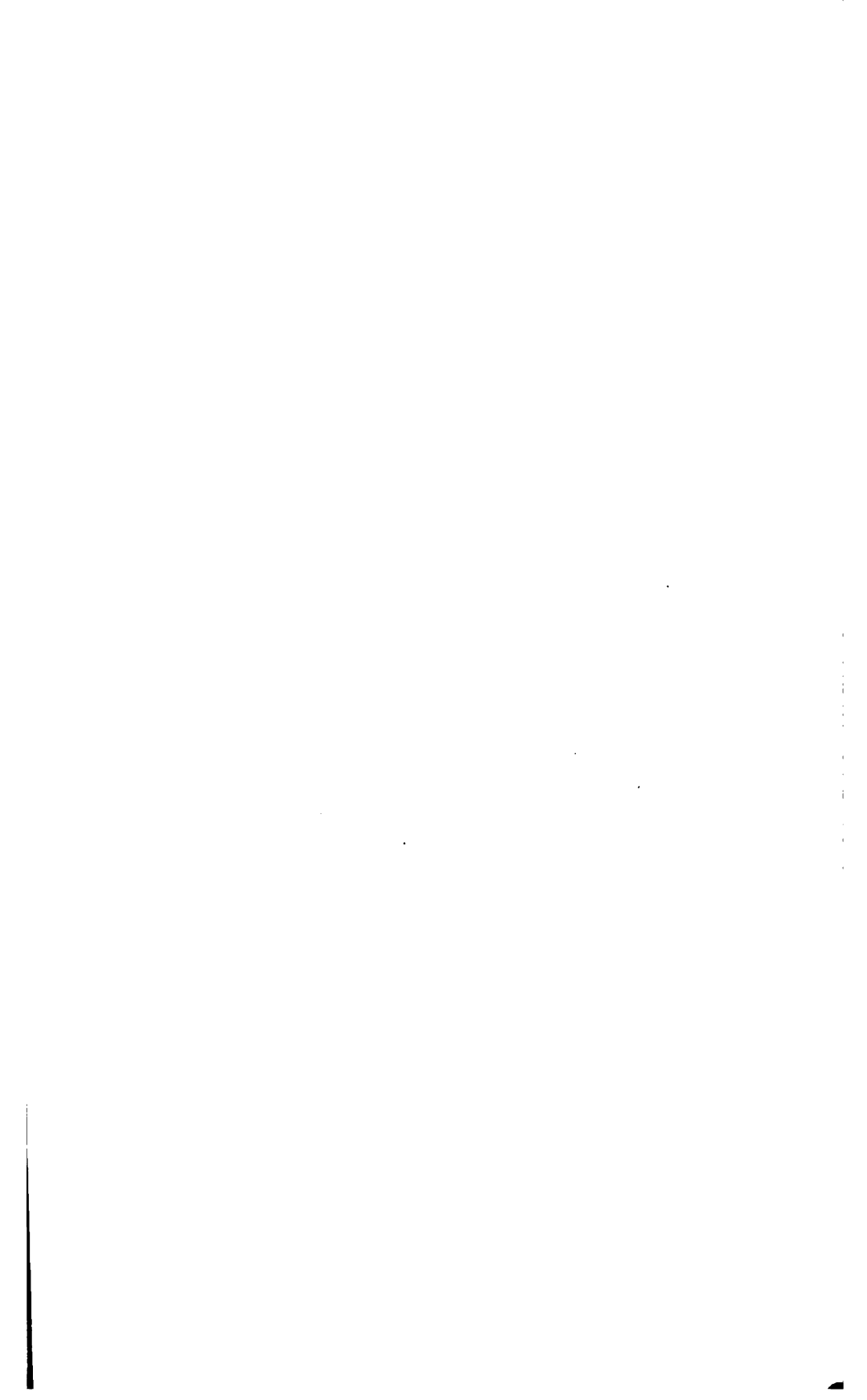


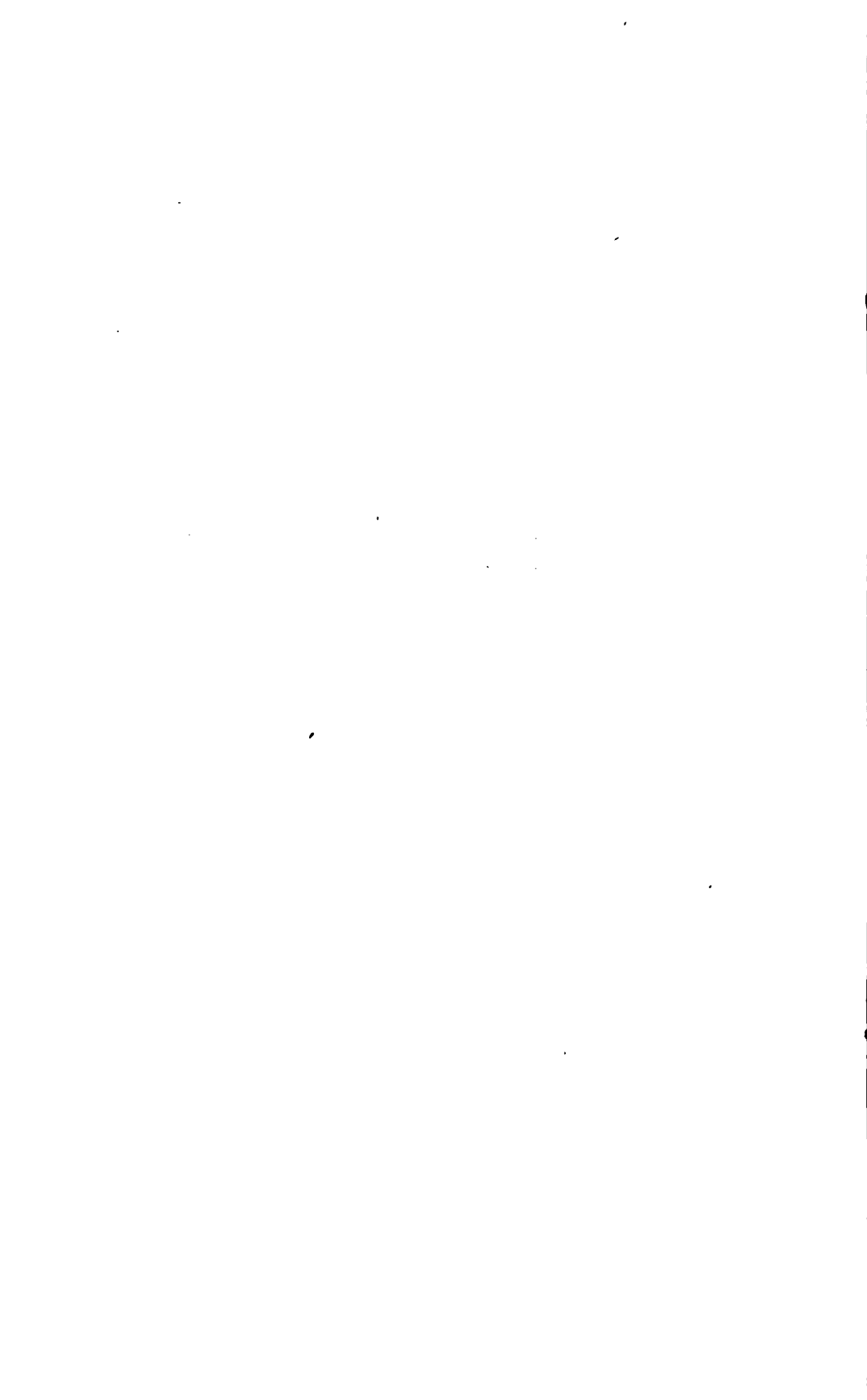
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REPORTS OF CASES

HEARD AND DETERMINED BY

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL *at Bar Court of* IN CHANCERY.

BY

J. P. DE GEX, H. CADMAN JONES, AND R. HORTON SMITH,

BARRISTERS AT LAW.

EDITED,

WITH NOTES AND REFERENCES TO AMERICAN LAW,
AND SUBSEQUENT ENGLISH DECISIONS,

BY

J. C. PERKINS.

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ERRATUM. — Page 602: For 16 and 17 Vict. c. 117, read 17 and 18 Vict. c. 113.

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THE lamented death of Mr. FISHER, and the time required for arranging and editing his notes of the cases reported by him, have prevented the immediate completion of the series of DE GEX, FISHER and JONES's Reports. The remainder of that series is in progress, as is also the remainder of the last volume of DE GEX, MACNAGHTEN and GORDON's Reports; but it has been considered advisable in the meantime not to delay the publication of the Reports of the present Reporters.

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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY.

GOSLING *v.* GOSLING.

1862. November 7, 18. Before the Lord Chancellor Lord WESTBURY.

A testator devised lands in trust for the use of the second son of a brother for life, with remainder to the use of his first and other sons successively in tail male, with successive limitations in remainder for life, and to the first and other sons of the successive tenants for life in tail male; and he bequeathed his residuary personal estate upon such trusts as were thereby declared concerning the devised lands, or as near thereto as the rules of law and equity would admit, but so that no part thereof should vest absolutely in any tenant in tail unless he attained twenty-one. *Held*, that the trust of the personalty was not void for remoteness.¹

THIS was an appeal from a decision of the Master of the Rolls holding a limitation of the trusts of the residuary personal estate of a testator to be void for remoteness, and declaring that the testator died intestate with respect to it.

Bennett Gosling, late of Fleet Street, banker, deceased, by his will, dated the 8th of March, 1844, directed that the right to succeed him and to become in his place partner in the bank in which he was, or at his decease should be, a partner, should be offered first to Ellis Gosling the second son of the testator's

¹ Affirmed on appeal, *Christie v. Gosling*, L. R. 1 H. L. 279; *Holloway v. Webber*, L. R. 6 Eq. 523; *Shelley v. Shelley*, L. R. 6 Eq. 540; *Perry Trusts*, § 389; *Harrington v. Harrington*, L. R. 3 Ch. Ap. 564.

brother Robert Gosling, and in case he should refuse or neglect
 * 2 to * accept such offer in the manner and within the period
 therein appointed in that behalf, then and in such case that
 the like offer should be made in succession to the third and every
 other younger son of the testator's brother Robert Gosling who
 should be born in the testator's lifetime or in due time after his
 death (exclusive of the testator's said brother's then eldest son
 Robert Gosling) in the order and according to the priority of their
 respective births, every such offer to be made only in the event of
 the preceding son and sons respectively entitled to an offer neglect-
 ing or refusing to accept the offer made to him and them respec-
 tively in the manner and within the period therein appointed in
 that behalf; and in case none of them the said second and younger
 sons of the testator's brother Robert entitled to such offer should
 accept the offer so to be made to them as aforesaid within the
 period and in the manner therein appointed in that behalf, then
 the testator directed that the like offer should be made in succe-
 sion to the first and every other son of his brother Thomas
 George Gosling who should be born in the testator's lifetime or in
 due time after his death who at the time of his death should not
 already be a partner in the said bank in the order and according
 to the priority of their respective births.

The will, after further provisions with reference to the share in
 the partnership business, proceeded as follows :—

“ I bequeathe the sum of 50,000*l.* sterling unto my cousin Henry
 William Gregg, Esq., and John Charles Sharpe, Esq., of No. 19,
 Fleet Street, in the county of Middlesex, or such of them as shall
 accept the trusts hereby reposed in them, their or his executors,
 administrators, and assigns, upon trust to lay out and invest the
 same in the purchase of lands and hereditaments in England
 * 3 in fee-simple with a mansion-house thereon; * and I hereby
 direct that such lands and hereditaments when so purchased
 shall be conveyed and assured unto them my said trustees or
 trustee accepting as aforesaid, and their or his heirs, but neverthe-
 less to the uses, upon the trusts and subject to the provisions
 hereinafter declared concerning the same; that is to say, to the
 use of them my said trustees or such of them as shall accept the
 trusts hereby reposed in them as aforesaid, their or his executors
 or administrators, in the mean time and until some one of them

the said second and younger sons of my said brother Robert Gosling or first and other sons of my said brother Thomas George Gosling born as aforesaid, having had the aforesaid offer made to him in the order and series aforesaid, shall accept the same, or until the period hereinbefore mentioned within which the last of such offers may be accepted shall have expired, whichever of such events shall first happen, upon trust to collect and receive the rents, issues, and profits of the lands and hereditaments so to be purchased, and by and out of the same to keep up and maintain the mansion-house and all other the buildings thereon in good and substantial repair and condition, and to stand possessed of the surplus of such rents, issues, and profits upon the trusts for accumulation and for the application of such accumulations hereinafter declared concerning the same, and from and immediately after either such events shall have happened, then to the uses and subject to the provisions following; that is to say, in case any of them the said second or other younger sons of my said brother Robert shall accept the said offer in the manner and within the period hereinbefore appointed in that behalf, then and in such case to the use of the son so accepting and his assigns for and during his life without impeachment for waste, with remainder to the use of the first and every other son and sons of my nephew so accepting, severally and successively in the * order * 4 and according to the priority of their respective births, and the heirs male of the body and respective bodies of such son and sons, every elder of such sons and the heirs male of his body being always preferred and to take before every younger of such sons and the heirs male of his and their body and respective bodies, with remainder to the use of each and every son (if any) of my said brother Robert born in my lifetime or within due time after my death subsequently to the one who shall so accept, severally and successively in the order and according to the priority of their respective births, each for his own life only, without impeachment for waste; and from and immediately after the death of each of such my said last-mentioned nephews respectively, to the use of his first and every other son and sons severally and successively in the order and according to the priority of their respective births, and the heirs male of the body and respective bodies of such son and sons, every elder of such my last-mentioned nephews and his son and sons and the heirs male of his and their body and

respective bodies being always preferred and to take before every younger of such last-mentioned nephews and his and their son and sons and the heirs male of his and their body and respective bodies, with remainder to the use of all and every other son and sons of my said brother Robert who shall be born after my death, severally and successively in the order and according to the priority of their respective births, and the heirs male of the body and respective bodies of such my said last-mentioned nephews, every elder of such sons and the heirs male of his body being always preferred and to take before every younger of such nephews and the heirs male of his or their body and respective bodies, with remainder to the use of my said brother Thomas George Gosling for and during his life without impeachment for waste, with

* 5 remainder to * the use of the first and every other son of my said brother Thomas George born in my lifetime or within due time after my death, severally and successively according to the priority of their respective births, each for his own life only, without impeachment for waste."

Other remainders were then limited, and there was a direction, that in the conveyance of the lands and hereditaments which should be purchased in conformity with the directions of the will proper limitations should be inserted to trustees for preserving contingent remainders, and also proper declarations and directions for the trustees upon each and every of such cesser or determination of an estate for life to receive the rents and profits of the same lands and hereditaments upon every event of such determination during the residue of the life of each and every person whose estate and interest should have so determined; and after other provisions not material to be set out, the will proceeded thus : —

" And I hereby direct and declare, that they my said trustees or such of them as shall accept the trusts aforesaid shall stand possessed of the rents and profits of the said lands and hereditaments so to be purchased as aforesaid which shall arise in the mean time until some one of my said nephews in that behalf referred to shall accept the said offer, or the period for such offer being accepted shall have determined, upon trust to lay out and invest the same in their and his names in any of the parliamentary stocks or public funds of Great Britain, or upon government or real securities in

England and Wales, and to receive the interest, dividends, and annual produce of such investments, and in a similar manner to lay out and invest the same, and to go on so receiving and investing in order to accumulate the said rents and profits, interest, dividends, and produce at compound interest during such suspense, and to stand possessed of such accumulations upon trust to be added to and to go * along with my residuary personal * 6 estate hereinafter bequeathed. I give and bequeathe unto my said trustees or such of them as shall so accept as aforesaid, their or his heirs, executors, and administrators, all my real estate, and all the residue of my personal estate, upon trust to sell my Chambers at Lincoln's Inn, and to get in and convert into money all my said residuary personal estate, and to invest the moneys to arise from my said Chambers and residuary personal estate in their or his names or name of [*sic*] the parliamentary stocks or public funds of Great Britain, or at interest on government or real securities in England, and to stand possessed of all such investments and personal estate, and also to stand seised of all such real estate to such uses, upon such trusts and for such estates and interests, and with, under and subject to such powers and provisions as hereby are declared concerning the lands and hereditaments hereinbefore directed to be purchased, or as near thereto as the rules of law and equity will admit; provided nevertheless, and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years."

And the testator appointed his brothers Robert Gosling and Thomas George Gosling his executors.

The testator made several codicils to his will, by the third of which, dated the 16th of October, 1851, after reciting the trusts of the 50,000*l.* bequeathed by the will, and after reciting that he had since purchased a mansion-house and lands, containing about 303 acres, called Busbridge Hall, at Godalming, and eighteen acres adjoining, he revoked the bequest of 50,000*l.* given to his trustees by his will, and in lieu thereof he gave, devised, and bequeathed the mansion-house and land to * his trustees, together with * 7 all the furniture, pictures, wine, and every thing therein at the time of his decease, upon and for the several uses, trusts, intents, and purposes in his said will mentioned as to the mansion,

hereditaments, and premises to be purchased with the said sum of 50,000*l.*, or as near thereto as possible, and he thereby in every respect confirmed his said will or any codicil made subsequent thereto.

The testator died on the 12th of May, 1855, leaving Ellis Gosling, the second son of his eldest brother Robert Gosling, him surviving, at that time an infant of the age of nineteen years or thereabouts; and Ellis Gosling, upon the attainment of his majority on the 17th of January, 1857, accepted the offer in the will contained of the right to succeed the testator, and so become in his place a partner in the bank upon the conditions mentioned in the will, and thereupon became and until his death remained such partner.

He died on the 26th of January, 1861, intestate as to real estate, leaving the plaintiff Ellis Duncombe Gosling his only son, who was not born until the 27th of February, 1861, a few weeks after his father's death.

Upon the death of Ellis Gosling it was contended, on behalf of the plaintiff that he had become entitled to an estate in tail male in the real estate of the testator devised by his will and codicils, and to an absolute interest in the funds and property constituting the residuary personal estate, subject only to the proviso in the will contained that the same should not vest absolutely in the plaintiff unless he should attain the age of twenty-one years. Some of the next of kin of the testator on the other hand contended that according to

the true construction of the testator's will, the gifts therein
 * 8 contained of his residuary * personal estate and the accumulations thereof in favour of the sons and remoter issue male of the persons by the will made tenants for life of the lands and hereditaments thereby directed to be purchased were void.

The bill prayed that the testator's will and codicils might be established and the trusts thereof, so far as the same remained unperformed, carried into execution by the Court, and that the rights and interests of the plaintiff and of all other parties (if any) in the real and residuary personal estate of the testator and the accumulations thereof during the minority of Ellis Gosling, deceased, might be declared, and for consequential relief.

The cause came on to be heard on further consideration before the Master of the Rolls in June, 1862, when the decree under appeal was made, whereby it was declared that, subject to the life-

interest given by the will to Ellis Gosling, the testator's residuary personal estate and the accumulations of the rents, dividends, and income of the testator's real and residuary personal estate during the minority of Ellis Gosling, were not effectually disposed of by the testator's will and codicils, and that the testator died intestate as to the same; and also that so much of the accumulations as arose from the testator's real estate devolved at the decease of Ellis Gosling upon the testator's heir at law living at the time of his death; and subject as aforesaid, that the said residuary personal estate, and also such part of the said accumulations as arose therefrom, devolved at the death of Ellis Gosling upon the testator's next of kin living at the time of his death.

From this decision the plaintiff appealed.

* *The Solicitor-General* (Sir R. PALMER) and *Mr. Osborne*, * 9 for the appellant. — The old form used by conveyancers in cases like the present says nothing about the person taking being a tenant in tail “by purchase,” Powell on Devises, by Jarman, (a) as the modern forms *ex abundantissima cautela* do, and that old form corresponds with the words of the present will. The Master of the Rolls thought that the personalty was given in the events which have happened to be held in trust for the testator's nephew Ellis Gosling for life, and after his death for his eldest son, grandson, great-grandson, and so on, who should first attain the age of twenty-one years, when, and not before, it should become vested in such eldest son, grandson or great-grandson; and that such a trust in favour of those persons would be bad, unless it were limited to take effect within twenty-one years after the testator's death, erring, as we submit, in the first step of his judgment, and considering the case one within the principle of *Tollemache v. Coventry*, (b) *Ware v. Polhill*, (c) and *Lord Dungannon v. Smith*. (d) But there is not here, as there was in those cases, a gift to such a person as shall, at a future period, fill a certain character. In *The Countess of Lincoln v. The Duke of Newcastle*, (e) Lord ELDON said: “In *Vaughan v. Burslem*, (g) Lord THURLOW says distinctly there was nothing in the circumstance that the words ‘as far as the law will admit’ were not in Lord Foley's will. The words in

(a) Vol. 1, pp. 696, 697 (3d ed.).

(b) 2 Cl. & Fin. 611.

(c) 11 Ves. 257.

(d) 12 Cl. & Fin. 546.

(e) 12 Ves. 218, 235.

(g) 3 Bro. C. C. 101.

Vaughan v. Burslem were as strong as could be; but Lord THURLOW again held, considering himself fortified by the judgment * 10 upon the appeal in *Foley v. Burnell*, (a) that he could * never construe that will as calling upon him so to modify the personal estate as to tie it up for twenty-two years, which is as far as the law will admit; and his Lordship marked all that reasoning upon the words ‘as far as the law will admit,’ &c., by stating that it was mere pedantry to rely upon it, and held a son, upon coming into *esse*, absolutely entitled.” Moreover, weight must be given to the consideration that the vesting spoken of in the proviso in Mr. Gosling’s will is an absolute vesting. *Taylor v. Frobisher*, (b) which was cited by us below, was rather cited as an illustration than as a governing case. In these cases, the first tenant in tail coming into *esse* is entitled absolutely, unless you can find apt words to prevent such a result. *Ibbetson v. Ibbetson*, (c) and *Lord Dungannon v. Smith*, (d) are cases between which and the present there is a marked distinction, but *Lord Scarsdale v. Curzon* (e) is on all-fours with the present. No one can take this estate who is not a tenant in tail by purchase.

[THE LORD CHANCELLOR. — Your construction leaves a gap in the will through which the estate may fall.]

It is on that account that conveyancers now insert the words “by purchase.” To construe the proviso to extend to all tenants in tail for a hundred years would be monstrous.

They also cited *Egerton v. Earl Brownlow*, (g) *Gower v. Grosvenor*. (h)

Mr. Selwyn and *Mr. Rasch*, for Robert Gosling, Thomas Gosling, and Robert Gosling the younger, the executors and trustees of the will.

* 11 * *Sir Hugh Cairns* and *Mr. Charles Hall*, for the next of kin. — The question depends not on authorities but on the

(a) 1 Bro. C. C. 274.

(e) 1 John. & H. 40.

(b) 5 De G. & Sm. 191.

(g) 4 H. L. Cas. 1.

(c) 10 Sim. 495; 5 M. & C. 26.

(h) 5 Madd. 337.

(d) 12 Cl. & Fin. 546.

construction of the two sentences in this particular will. We may put aside one of the points made against us. It is admitted on the other side that this is not an executory trust, but that the testator is his own conveyancer. The question is, Has the testator or not transgressed the rule against perpetuities? What is the effect of these two provisos as controlling each other? Is the first the principal and the other the auxiliary? If there is at all a difference, we say that the second is the more important. If the expression "tenant in tail" means tenant in tail by purchase, *cadit quæstio*. If, however, it means, as we contend, the person of whom when in possession it can be predicated that he is tenant in tail under the limitations of the instrument, it is different. The object is not to take the personalty out of the son for the mere purpose of making an intestacy. The first thing to be done is to construe the clause and then will come the consideration whether it contravenes the rules against perpetuities.

[THE LORD CHANCELLOR. — The son of the plaintiff could not take by possibility as purchaser under the antecedent clause. A tenant in tail by descent of personalty is a thing not known to the law.]

In that case the second clause must be read as divesting the personalty, and it is not given to any one else. The case of *Byng v. Byng*, (a) in the House of Lords, is one illustrative of the present. So Mr. Waley, in his Treatise on Settlements, says: (b) "With respect to leaseholds for years, if they were merely settled upon trusts to correspond to the uses of the freeholds, they would vest absolutely in the first tenant in tail of the realty immediately * upon his birth, and the addition of the words 'so * 12 far as the rules of the law and equity will permit,' make no difference in this respect. In order to obviate this effect, it early became the common course of settlement to suspend the absolute vesting till the age of twenty-one. In the forms in this collection the effect of the declaration of the trusts of the leaseholds, by reference to the uses of the freeholds, is qualified by a clause providing that leaseholds for years shall not vest absolutely in a tenant in tail by purchase unless he attain twenty-one, but on his death

(a) 31 L. J. (N. S.) Ch. 470.

(b) Davidson's Conveyancing, vol. 3, p. 495 (2d ed.).

under that age shall devolve with the freeholds of inheritance ; a direction which, if he leave issue inheritable under the entail, will carry over the leaseholds to the issue, and if he die without leaving such issue will carry them to the remainder-man." But, after all, the question is, Are the two sentences to be construed together or separately? We say they should be construed together. The plaintiff, at all events, is not at present entitled to the decree for which he asks, as there are questions which cannot yet be decided.

They also referred to *Lord Dungannon v. Smith, (a) Wainman v. Field. (b)*

Mr. Rawlinson, for Charlotte Gosling, one of the defendants.

The Solicitor-General replied.

Judgment reserved.

November 18.

THE LORD CHANCELLOR. — In the will of this testator * 13 there is first a series of * limitations of real estates directed to be purchased, which it is admitted are not open to any objection.

The testator then directs an accumulation of the rents of the purchased estates in an event which did not happen, and he gives such accumulations and also devises and bequeathes his real estate and all his personal estate unto trustees, who it is declared shall stand seised and possessed thereof, to such uses, upon such trusts and for such estates and interests and with, under and subject to such powers and provisions as were thereby declared of and concerning the estate thereinbefore directed to be purchased, or as near thereto as the rules of law and equity will permit.

Then follows this proviso: Provided nevertheless; and I hereby declare, that the said accumulations and personal estate shall not, nor shall any part thereof, vest absolutely in any tenant in tail, unless such person shall attain the age of twenty-one years.

The question I have to decide depends on the true construction of this proviso.

(a) 12 Cl. & Fin. 546.

(b) Kay, 507.

The expression "tenant in tail" in the proviso must mean a person who takes the real estate in tail under the limitations thereof, and who also takes the personal estate under the trusts that are by reference declared of it. For the tenant in tail described is one in whom, but for the proviso, the personal estate would vest absolutely, that is, vest without being subject to be divested. The proviso is intended to provide for an infant tenant in tail taking an absolute interest in the personal estate under the trusts which are declared of it, and afterwards dying during his infancy. But inasmuch as personal property does not pass by descent, and there can be no estate tail * in it, the proviso must apply to * 14 such tenants in tail only of the real estate as take the personal estate (if I may use an incorrect expression) by purchase under the trusts declared by the will, and the question is, whether such tenants in tail include any tenant in tail taking by descent. As I read the judgment of the Master of the Rolls, he assumes the fact to be, that the proviso includes and applies to tenants in tail taking by descent under the limitations of the devised real estates, as well as those taking by purchase. The correctness of this conclusion depends on the inquiry, whether the disposition made by the will of the personal estate contains or involves any trust for a tenant in tail who takes the real estate by descent.

Before entering on that inquiry, I ought to observe first, that it is clear that the trusts of the personal estate are not executory in the proper sense in which that word is used in this Court. If they were, there would be no illegality. Secondly, it is well settled that the disposition made of the personal estate is not extended or altered by the words "as near thereto as the rules of law and equity will admit."

The personal estate is bequeathed by words of reference. The trustees are to stand possessed of it upon such trusts and for such estates and interests as are declared concerning the real estates.

I will state concisely, so far as is necessary, the uses of the real estate, and then the corresponding trusts of the personalty, premising (what it is hardly necessary to mention) that words creating an estate tail in realty confer the absolute ownership in personal estate.

The uses of the real estate stated shortly (and substituting * the name of Ellis Gosling, the nephew who accepted * 15

the partnership, for the description of such nephew) are the following: To the use of Ellis Gosling for life, with remainder to the use of the first and other sons of Ellis Gosling in tail male, with remainder to the other sons of the testator's brother Robert younger than Ellis who should be *in esse* at the testator's death, severally and successively for life in the order of seniority; with remainder to the first and other sons of such younger sons respectively in tail male, with remainder to subsequently born sons of Robert for life, with remainder to their first and other sons in tail male in like manner, with remainder to the testator's brother Thomas George Gosling for life, with remainder to his first and other sons in tail male, with divers other remainders, which it is not necessary to detail.

Now what are the trusts of the personal estate, which, so far as the difference of tenure will admit, will be identical with these uses of the real estate? I will state them first without the proviso, and then show the effect of the proviso and to what persons it will apply. The first trust of the personalty would be to pay the dividends, interest and income to Ellis Gosling the nephew during the term of his natural life, and after his decease the trustees would hold the personal estate and the income thereof upon trust for the first or only son of the said Ellis Gosling, his executors, administrators, and assigns. Here, but for the proviso, the trust would stop, and could not be extended to the second and other sons of the tenant for life; for the next trust directed by the words of gift of the personal estate without the proviso would be a declaration that in case there should be no son of Ellis Gosling, the trustees should hold the personal estate upon trust to pay the income to the next younger brother of Ellis Gosling for life, and after

* 16 his * decease upon trust as to principal and interest for his eldest or only son absolutely, with a gift over in like manner as before to the next tenant for life of the real estates, and so on throughout the series. But when you add the proviso to the disposition of the personal estate, which is made by the words of reference, the effect is this, that a new trust is created, in the event of any tenant in tail taking the personal estate under the trusts I have described and dying under the age of twenty-one years, for the next succeeding tenant in tail or tenant for life, as the case may be; but it is plain that the proviso attaches only to tenants in tail taking by purchase, for no tenant in tail by descent can take

the personal estate under the disposition which is made of it. The only object and effect of the proviso are to substitute the next tenant in tail or tenant for life, as the case may be, taking by purchase for the preceding tenant in tail, also taking by purchase, in case such preceding tenant in tail dies under the age of twenty-one years.

It is true that a contingency very material to be provided for is not included in this proviso. A tenant in tail taking the real and personal estate as a purchaser may marry and have a son, and afterwards die before attaining the age of twenty-one years, leaving such son tenant in tail of the real estates. In such an event the proviso transfers the personal estate to the next purchaser in the series of limitations, and it becomes severed from the real estate, which descends to the son of the deceased tenant in tail. This event is not provided for, but that circumstance does not authorize any different interpretation of the proviso. If the will had provided for the event of a tenant in tail by purchase dying under twenty-one leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates by descent * taking the per- * 17
sonal estate by purchase; and if in that case the proviso were held to apply to and include such tenant in tail, the whole disposition of the principal of the personal estate would be void for remoteness. But no such trust is, in my opinion, either expressed or implied, or in any manner warranted by the words of gift of the personal estate either with or without the proviso.

Again, if the words of gift of the personal estate taken with the proviso could possibly be interpreted to amount to a trust of the *corpus* of the personalty for such tenant in tail only under the limitations of the real estate as should first attain the age of twenty-one years, so that in the words of the Master of the Rolls the attaining twenty-one would be a precedent condition to the vesting, it would follow that the gift of the *corpus* of the personal estate would be void for remoteness. But in my judgment it is not possible to put any such construction on this will. I am of opinion, therefore, that the disposition of the personal estate made by this will is good in law.

Therefore, reverse the decree of the Master of the Rolls. Declare that the trusts of the personal estate declared by the will are valid

in law, and that under and by virtue thereof the accumulated rents of the real estate and personal estate bequeathed by the will are vested in the plaintiff, subject to be divested in the event of the plaintiff dying under the age of twenty-one years. The costs of all parties to the appeal must come out of the personal estate, and the deposit be returned.

1862. November 4, 18, 14, 18. Before the Lord Chancellor Lord WESTBURY.

By a settlement, a sum of money was directed to be raised after the death of the survivor of two persons, and be held in trust for all the children of the tenant for life of hereditaments settled by a contemporaneous deed other than and besides an eldest or only son for the time being entitled under the last-mentioned settlement to the estates thereby settled in possession or in remainder immediately expectant on the decease of the survivor of the tenant for life and a prior tenant for life. *Held*, that the exclusion applied only to the person who was the eldest son at the time appointed for raising the money, and that the representatives of an eldest son who had died before that period were entitled to participate in the money.¹

Persons brought before the Court under the 15 & 16 Vict. c. 86, § 42, r. 8, are entitled to present petitions of rehearing, *semble*.

THIS was an appeal from a decision of Vice-Chancellor KINDERSLEY, holding that the appellant's testator was, according to the true construction of a settlement, excluded from participation in portion money thereby directed to be raised.

By an indenture of settlement dated the 7th of September, 1814, an estate in Gloucestershire, called the Bibury estate, was limited to the use of Estcourt Cresswell for life, with remainder to the use of Richard Estcourt Cresswell the elder for life, with remainder to the use of Richard Estcourt Cresswell the younger, his eldest son, for life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the other sons of Richard Estcourt Cresswell the elder successively for life, with remainders to their first and other sons in tail male.

By an indenture of the same date, made between Estcourt Cress-

¹ See *Collingwood v. Stanhope*, L. R. 4 H. L. 43; S. C. L. R. 4 Eq. 286; *Wood v. Wood*, L. R. 4 Eq. 48; *Johnson v. Foulds*, L. R. 5 Eq. 268.

well of the first part, Richard Estcourt Cresswell the elder of the second part, and the Rev. Charles Dewell and the Rev. Thomas Tracy Coxwell of the third part, after reciting that Estcourt Cresswell was seised in fee-simple in remainder of the hereditaments thereafter demised expectant upon the decease of the * Rev. Thomas Fry, and had agreed to secure as a provision * 19 for the younger children of Richard Estcourt Cresswell the sum of 13,000*l.* upon the said hereditaments in manner thereafter mentioned, Estcourt Cresswell demised to Charles Dewell and Thomas Tracy Coxwell, their executors, administrators, and assigns, lands and hereditaments in Devonshire (subject to the life-estate therein of Thomas Fry, and to prior encumbrances which were subsisting thereon still remaining unsatisfied) for the term of 1000 years from the decease of Thomas Fry, without impeachment of waste, upon trust immediately after the decease of the survivor of Estcourt Cresswell and Thomas Fry, and not before (except in the event thereafter mentioned), by selling, mortgaging, demising, assigning or otherwise disposing of the manors and other hereditaments comprised in the term of 1000 years, or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments, or any of them, for the rents then in arrear, or by more than one or by all of the aforesaid ways and means or by any other ways and means, to levy and raise the sum of 13,000*l.*, with interest at the rate of 5*l.* per cent per annum to be computed from the decease of the survivor of Estcourt Cresswell and Thomas Fry, and to invest the same and hold the investments and their annual produce upon trusts thus expressed, "upon trusts that they the said C. Dewell and T. T. Coxwell, their executors, administrators, and assigns, do and shall stand and be possessed of and interested in the same, in trust for all and every the children of the said Richard Estcourt Cresswell now born or hereafter to be born during his life or in due time after his decease (other than and besides an eldest or only son for the time being entitled under or by virtue of a certain indenture of settlement bearing even date herewith" [meaning thereby the above stated indenture] "to the estates thereby settled in possession or * in remainder * 20 immediately expectant on the decease of the survivor of them the said Estcourt Cresswell and Richard Estcourt Cresswell), with such provisions for their respective maintenance and education, in such parts, shares and proportions and at such age, day or time,

or respective ages, days or times, not happening after twenty-one years, to be computed from the decease of the said Richard Estcourt Cresswell, and with such annual sums of money and limitations over for the benefit of the said children, or some or one of them, and upon such conditions and with such restrictions and in such manner," as R. E. Cresswell should by deed or will direct or appoint, "and in default of any such direction or appointment, or so far as every or any such direction or appointment shall not extend, . . . if there shall be two or more children of the said Richard Estcourt Cresswell other than and besides an eldest or only son so for the time being entitled as aforesaid, then, in default of such direction or appointment as aforesaid, the said sum of 13,000*l.*, and the stocks, funds, and securities upon which the same shall be laid out and invested, and the interest, dividends, and annual produce thereof, to be for the portions of such two or more children, and to be divided between or among them in equal shares and proportions as tenants in common and not as joint tenants, and the share or shares of such of them as shall be a son or sons to be an interest vested or interests vested in him or them respectively at his or their age or respective ages of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters to be an interest vested or interests vested in her or them respectively at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which shall first happen," with the usual provisions for hotchpot, accruer, maintenance and advancement.

* 21 * Estcourt Cresswell died on the 4th of July, 1823, and Richard Estcourt Cresswell the elder on the 21st of May, 1841.

Of the children of the latter, the eldest, Richard Estcourt Cresswell the younger, died in April, 1887, having previously attained twenty-one and married, but without having had issue male, and leaving one of the appellants his widow, who after her husband's death took out letters of administration of his personal estate, and married Joseph Alexander Franklinsky, the other appellant.

William Henry Cresswell, although not in order of birth the next son of Richard Estcourt Cresswell the elder to R. E. Cresswell the younger, became, in the events which happened, the eldest son of R. E. Cresswell the elder entitled in remainder,

expectant upon the death of the latter, as tenant in tail of the Bibury estate.

Thomas Fry, the tenant for life, died on the 27th of March, 1860.

This suit was thereupon instituted by the representative of the surviving trustee of the settlement of 1814, with the object of having the trusts of the 1000 years' term limited in the estates in Devonshire carried into execution under the decree of the Court, and for the ascertainment and declaration of the rights of all persons beneficially interested in the 13,000*l.* to be raised under the trusts of the term.

Upon the case coming on for hearing on further consideration before Vice-Chancellor KINDERSLEY, his Honor made the order under appeal, declaring that according to the true construction of the settlement of September, * 1814, and in the events * 22 which had happened, the sum of 13,000*l.* secured by the term of 1000 years in the Devonshire estate became and was divisible and payable on the death of T. Fry, the tenant for life of the said Devonshire estate, into seventh parts, thereby excluding the personal representative of Richard Estcourt Cresswell the younger from participation therein. The case is reported in Messrs. Drewry & Smale's Reports. (a)

The appellants were not originally parties to the cause, but had been served with the decree under the 15 & 16 Vict. c. 86, § 42, r. 8, and an objection was on that ground made by the Secretary to the reception of the petition.

November 4.

Persons brought before the Court under the 15 & 16 Vict. c. 86, § 42, r. 8, are entitled to present petitions of rehearing, *semble*.

Mr. Graham Hastings on this day moved that the petition might be directed to be received.

The Lord Chancellor intimated an opinion that persons brought before the Court under the operation of the rule of the statute above referred to were entitled to present petitions of rehearing, and directed the petition to be received, but without prejudice to any question which might be raised upon the hearing of the appeal.

(a) Vol. 2, p. 111.

November 18.

The appeal now came on for hearing, and no objection was made to the petition having been received.

Mr. Shapter and Mr. Graham Hastings, for the appellants. — An elder son, not entitled in possession or remainder to the Bibury estate when the portion out of the Devon estates was to be raised and distributed among younger children, is to be deemed a * 23 younger son : therefore the * administratrix of Richard Estcourt Cresswell the younger is entitled to a share of the portion fund. He never was excluded from a share of the portion fund ; for the trust was in favour of all the children (of whom he was one), with an exception of such one child only as for the time being should be entitled in possession or remainder to the Bibury estate. The period of distributing the portions was the time for ascertaining the one excluded. *Matthews v. Paul*, (a) *Duke v. Doidge*. (b) "For the time being" may mean "from time to time" where the context requires it, as where divers payments are to be paid to an officer for the time being, where divers times must be meant, but *prima facie* those terms point to one definite time. *Moss v. Dunlop*, (c) *In the Goods of Thompson*, (d) *Cowie v. Stirling*. (e) It is true, rights are to be ascertained and to vest and the class to be ascertained as early as possible, and a divesting must not take place without clear direction ; and that principle explains the rule laid down in *Livesey v. Livesey*, (g) *Adams v. Adams*, (h) *Re Theed's Settlement*, (i) *Sandeman v. Mackenzie*, (k) that in ordinary cases of gifts to children, excluding an eldest, without reference to a family estate, the character of eldest is to be ascertained at the period of vesting and not of payment, and the period of vesting and of exclusion are the same. This, however, has no application where the word "elder" or "eldest" has reference to a family estate. *Lord Teynham v. Webb*, (l) *Macoubrey v. Jones*. (m) Moreover a class opens up to

(a) 3 Swanst. 328.

(g) 2 H. L. Cas. 419.

(b) 2 Ves. Sen. 203, n.

(h) 25 Beav. 652.

(c) Johns. 490.

(i) 3 K. & J. 375.

(d) 16 Jur. 342.

(k) 1 J. & H. 613.

(e) 6 El. & Bl. 333.

(l) 2 Ves. Sen. 198.

(m) 2 K. & J. 684, 692. See also *Dickson v. Dickson*, 1 Macq. H. L. Cas. 729.

the period of distribution to let in one answering the description. Therefore if Richard Estcourt Cresswell the younger was * at any time excluded, the class opened to let him in on his * 24 ceasing to be an eldest son entitled.

They referred also to *Chadwick v. Doleman*, (a) and *Remnant v. Hood*. (b)

Mr. Prendergast (with him *Mr. Baily*), for the plaintiff and the younger children, who opposed the appeal. — The recital in the settlement, under the terms of which the 18,000*l.* is raisable, shows that the intention of the settlor was to secure a provision for the younger children and the younger children only of Richard Estcourt Cresswell the elder. The latter, therefore, never could have appointed under that deed any portion of this fund to Richard Estcourt Cresswell the younger; who having attained his majority before his death, filling therefore at the time of vesting in the class in default of appointment the position of eldest son for the time being entitled to the Bibury estate, cannot be brought back again into the class from which he was thus, as also by the very terms of the settlement, excluded. He died too before the time for distribution arrived.

He cited *Gray v. The Earl of Limerick*. (c)

Mr. Surage, for the trustees of the settlement of one of the younger children, called attention to the fact that Richard Estcourt Cresswell the younger's personal representative was making a claim which he himself could not have made if living.

Mr. Shapter, in reply. — The words "for the time being entitled" distinguished this case from that of *Gray v. The Earl of Limerick*.

Judgment reserved.

November 18.

* THE LORD CHANCELLOR. — This case depends on the * 25 inquiry at what time the words of exclusion of the eldest

(a) 2 Vern. 528. (b) 2 De G., F. & J. 396. (c) 2 De G. & Sm. 370.

son for the time being come into operation; that is to say, at what time the eldest son for the time being is to be looked for and ascertained.

The trustees are directed, immediately on the decease of the survivor of Thomas Fry and Estcourt Cresswell, to raise the sum of 13,000*l.*, in trust for all and every the children of Richard Estcourt Cresswell the elder then born or thereafter to be born during his life, or in due time after his decease, other than and besides an eldest or only son for the time being entitled under a settlement of even date to the estates thereby settled in possession or in remainder immediately expectant on the decease of the survivor of Estcourt Cresswell and Richard Estcourt Cresswell. This trust took effect on the death of Thomas Fry in the year 1860. At that time, therefore, the words of exclusion came into operation, and had to be applied. The persons entitled must be ascertained at the time when the money is directed to be raised and divided, and the words of exception appear to me to attach at that time upon the son who then answers the description, and to exclude him from the class of persons interested. The case hardly stands in need of the well-established principles in this Court, by which a younger son taking the estate has been deemed an eldest son for the purpose of excluding him from a portion; and an eldest son not taking the estate has been held to be a younger child; for the words here are "eldest son for the time being," which appear to have been selected for the purpose of denoting not the person who was actually the eldest son at the date of the deed, but that individual who at a particular
 * 26 future period might be the eldest living son, * provided he was also the person who was entitled to the settled estate.

If the report which I have seen of the Vice-Chancellor's judgment be correct, his Honor appears to have treated the question as turning on the meaning of these words, "for the time being;" and he seems to have considered that they were intended to operate during the whole period that would elapse between the execution of the deed and the time when the money was to be raised, so that every son who answered the description of eldest son from time to time during that period would be excluded. The effect of such a construction might be to exclude every son, and possibly every child, for he might have none but sons, from any

share in the 13,000*l.*, which, therefore, would not become raisable at all.

I cannot concur in this interpretation. When a future period is referred to, and it is desired to designate the person who fills a particular character at that period, the words "for the time being" are appropriately used. If several future periods are referred to the words are again appropriate, and may denote several different persons who may in succession fill the character at such several periods. If I say that when a particular office shall become vacant, the appointment shall belong to the prime minister for the time being, the words denote one person only, for one period only is referred to; but if, as in the instance put by the Vice-Chancellor, I direct a certain sum to be paid annually to the rector of A. for the time being, the words denote the rectors from time to time, because they refer not to the time of one payment, but to the times of successive annual payments. In the present case one period of time only is referred to, namely, the time when the money is directed to be *raised. Accord- * 27 ing, therefore, to the literal meaning of the words, one person only is, in my opinion, denoted and excluded from a share in the 13,000*l.*; and this construction is strictly in accordance with the spirit and intention of clauses of this nature. For the intention is, that portions shall be provided for all the children except the one who at the time when the portions are payable is entitled to the settled estate. The intention which the Court ascribes to clauses of this description is well expressed by Lord HARDWICKE in *Duke v. Doidge*: "Every child except the heir is considered in equity as a younger, and eldership not carrying the estate along with it is considered not such an eldership as shall exclude by virtue of such clauses." That the character of eldest son is to be ascertained at the time appointed for payment of the portions appears to be the clear result of the leading cases of *Chadwick v. Doleman* and *Lord Teynham v. Webb*.

The Vice-Chancellor has treated *Lord Teynham v. Webb* as an authority for excluding by force of the words, "other than an eldest son," the son who was eldest at the date of the instrument, and also the subsequently born son who was eldest at the time of payment; but I do not so read the case, for the son who was eldest at the date of the instrument appears to have been put out of consideration because he died under age, and before the time

appointed for raising the portions, there being no direction for vesting anterior to the time of payment.

At the conclusion of the report I find the following words attributed to the Vice-Chancellor: "There is no case which I can find in which there is one who, having been an eldest son and ceased to be so, has been excluded, and yet his representa-
* 28 tives have been included; and it *would be very anomalous if one who, whilst alive, would be excluded, should, at his death, be entitled to participate."

But it must be remembered that the trust of the 13,000*l.* is for all the children of Richard Estcourt Cresswell the elder, except the eldest son for the time being; and, therefore, that Richard Estcourt Cresswell the younger is one of the *cestuis que trustent*, unless he be excluded by the exception; and consequently, if I am right in my judgment, that the exception did not operate or take effect until the time appointed for raising the money, and then attached upon and excluded William Henry Cresswell, who is found by the certificate to have been at the death of Thomas Fry the eldest living son of Richard the father, and entitled to the Bibury estate, it follows that Richard Estcourt Cresswell the younger was never taken out of the class of *cestuis que trustent*, and that, having attained twenty-one, when the right to the portions became vested, he is to be considered as a younger child and entitled to a share in the 13,000*l.*

Therefore, reverse the order of the Vice-Chancellor, declare that Richard Estcourt Cresswell the younger became entitled to a share in the 13,000*l.*, and direct the fund which has been raised to be divided into eight equal parts instead of into seven equal parts, and direct payment of one of those eight equal parts to the personal representative of Richard Estcourt Cresswell the son. The petitioners must take back their deposit, and the costs of all parties, by consent, will come out of the fund.

* In the Matter of The JOINT-STOCK COMPANIES * 29
WINDING-UP ACTS, 1848 and 1849,

AND

In the Matter of The SAXON LIFE ASSURANCE COMPANY.

The Case of The ERA LIFE AND FIRE ASSURANCE COMPANY.

1862. November 21. Before the LORDS JUSTICES.

The deed of settlement of a joint-stock insurance company empowered a general meeting to elect and remove directors, audit accounts, and to determine upon any question, matter, or thing relating to the affairs of the company which should arise in the management or conduct thereof. It also empowered the directors to alter or rescind or abandon any contract entered into on behalf of the company, and to institute, abandon, and compromise actions and suits, and generally, where the deed was silent, to act in the direction of the concerns of the company in such manner as at their absolute discretion they should think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters and things whatsoever as might be requisite or expedient in that behalf. The directors purchased the business and undertook to pay the debts of another insurance company, and the purchase was approved of at a general meeting, and was carried into effect by a purchase-deed, in which the purchasing company took covenants from the directors of the selling company, and not from the company itself, for the title. The purchasing company took the business of the selling company, and carried it on till nearly a year after the execution of the deed of purchase, when both companies were ordered to be wound up under the winding-up Acts:

Held, —

1. That the purchase of the business was not beyond the power of the purchasing company, and that therefore the engagement to pay the debts of the selling company, being part of the terms of the purchase, was not beyond those powers.
2. That, under the circumstances, the purchasing company could not prove against the selling company for moneys paid by them in respect of the debts of the selling company on the ground that the sale was void, and that for this purpose it was immaterial whether the sale was beyond the powers of the selling company or not.
3. *Seemle*, that the change of the position of the selling company owing to the sale prevented the parties being restored to their original position, and that the moneys in question could not be recovered.

THIS was an appeal from the decision of Vice-Chancellor Wood, reported in Messrs. Johnson & Hemming's Reports (a), rejecting a proof tendered under the order for winding up the Saxon Life Assurance Company, on behalf of the Era Life and Fire Assurance Company.

The claim to prove arose out of a purchase made by the * 30 Era Company, which was a company registered * under the Act 7 & 8 Vict. c. 110, of the business, property and effects of the Saxon Company; a company also registered under the same Act. The agreement of purchase was dated the 15th of June, 1856. It was afterwards modified by two agreements dated the 28th and 30th of January, 1857, and as modified was ultimately carried into effect by a deed dated the 1st of August, 1857, and made between the Saxon Company of the first part, three of the directors of that company of the second part, a great number of persons who were shareholders in the Saxon Company of the third part, the Era Company of the fourth part, and three of the directors of the Era Company of the fifth part. By this deed it was witnessed, that the Saxon Company thereby assigned all their property and effects to the Era Company, and then the three directors of the Saxon Company also joined in that assignment, and there was a power of attorney to enable the Era Company to recover moneys due to the Saxon, followed by covenants with the Era, all of which were entered into on the part of the shareholders of the Saxon Company, but not of the company itself, having for their object to carry into effect that agreement, and a covenant by the Era Company to pay the debts and liabilities of the Saxon Company.

After the date of the agreement of the 15th of June, 1856, but before the execution of the above-mentioned deed, an order was made by this Court to wind up the Saxon Company. This order was made subject to the agreement of the 15th of June, 1856. Before the above-mentioned deed was executed, all proceedings under the order were stayed by an order of this Court dated the 11th of June, 1857. In pursuance of the above-mentioned deed, the Era Company took possession of the property and effects of the

Saxon Company, removed the business of the Era Company * 31 to the Saxon Company's * office, got in various debts due to, and paid some of the debts due from, the Saxon Company,

(a) Vol. 2, p. 408.

granted new policies in lieu of some of the policies which the Saxon Company had granted, and appeared in all respects to have acted as owners of the purchased property.

The Era Company afterwards became embarrassed, and by an order of this Court dated the 29th of May, 1858, it was ordered to be wound up. Official managers of both the companies were appointed under their respective winding-up orders.

After the order for winding up the Era Company had been made, some of the creditors of the Saxon Company, whose debts the Era Company had undertaken to pay, applied to prove their debts against the estate of the Era Company, but their right to prove was disputed on the part of the Era Company; and their application was ultimately refused by the Vice-Chancellor upon the ground, as it appeared, that the agreements and deed made and entered into between the two companies were *ultra vires*.

Independently of the proofs which were thus rejected, the Era Company had, it appeared, paid on account of the debts and liabilities of the Saxon Company more than they had received from the assets of that company.

In this state of circumstances, the Era Company, by their official manager, applied to the Vice-Chancellor to prove against the estate of the Saxon Company for the excess of their payments beyond their receipts. It was from the refusal of this application that the present appeal was brought.

The 13th clause of the deed of settlement of the Era * Company dated the 27th of February, 1852, provided that * 32 it should be competent for any general meeting, ordinary or extraordinary, to elect directors and auditors, and to remove them and vary their number in manner therein provided, and to receive, examine and pass or reject the accounts, balance sheets and reports of the directors, auditors and (if any) of the actuary; to compel the production of any book, paper, deed, or document belonging to the society, and generally to control the board of directors; to authorize any act to which the sanction of a general meeting was thereby made requisite, and to discuss and, subject to the following clause and the provisions of the deed, to determine upon any question, matter or thing relating to the affairs of the company which should arise in the course of the conduct or management thereof, and should be brought before such meeting by any shareholder.

And the 38th clause provided, that it should be competent for

the directors to alter, rescind, or abandon any contract that might be entered into by them on behalf or in the name of the company, and also to institute, conduct and compromise, terminate and abandon, as they might think expedient, any actions, suits, or any other legal proceedings relating to the property or affairs of the society, and also to enter into and execute any such bond or agreement for the submission to arbitration as was specified in this clause, and to compound for or abandon any debt or debts owing to the company, and to sign or execute any deed of composition, conveyance, or assignment of estate and effects made by any debtor to the society, and to sign and execute the certificate or other discharge of any bankrupt or insolvent or other person indebted to the society, and also to authorize the chairman, deputy chairman

or any of the directors or the manager to prove any debt due * 33 to the company from any * bankrupt or insolvent, and generally where the deed was silent or did not otherwise provide, to act in the direction of the concerns of the company in such manner as at their absolute discretion they should think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters and things whatsoever as might be requisite or expedient in that behalf.

Mr. Giffard and Mr. Reilly, for the official manager of the Era Company, in support of the appeal. — As the Saxon Company had no right to sell their business to the Era Company, and the latter company had no right to buy it, the assignment was a nullity, and the consideration for which the directors of the Era undertook to pay the debts of the Saxon Company failed. The Saxon Company are consequently indebted to the Era Company in the amount paid by the latter company to the creditors of the former, after deducting the amount received by the Era in respect of the assets of the Saxon Company.

They referred to *Ernest v. Nicholls*, (a) *Balfour v. Ernest*, (b) *Stone v. Godfrey*. (c)

[The Lord Justice TURNER referred to *Bryson v. Warwick and Birmingham Canal Company*. (d)]

(a) 6 H. L. Cas. 401.

(c) 5 De G., M. & G. 76.

(b) 5 C. B. N. S. 601.

(d) 4 De G., M. & G. 711.

Mr. Roxburgh, for the creditors' representative of the Era Company.

Mr. Daniel and *Mr. W. Morris*, for the official manager of the Saxon Company. — The 13th and 38th clauses of the Era deed were * sufficient to authorize the purchase by that com- * 34 pany of the business of the Saxon Company, and whether the deed of the Saxon Company authorized the sale is immaterial, since the Era Company was aware of all the circumstances of the case and of the title which the Saxon Company could make. The transaction was confirmed by special general meetings of both societies. The care with which the deed was prepared; and all the circumstances of the case, prove that the Era Company had notice of every thing which it was material for them to decide. A large number of policies in the Saxon Company have been exchanged for policies in the Era, at the current rate of premium, and other dealings and transactions have taken place on the footing of the purchase extending over several years, and it would be impossible to restore the parties to their original position; the payments in respect of which the proof was tendered were not moneys paid to the use and at the request of the Saxon, but were paid in discharge of an obligation which the Era Company undertook. If such transactions could be undone at all it could only be on a bill filed by a shareholder of the Era against the Saxon and Era Companies to set aside the deeds. Moreover, the order for winding-up was made subject to the agreement of the 15th of July, 1856, insisted on by the Era.

They cited *Ex parte Brotherhood, Re Agricultural Cattle Insurance Company*, (a) and *The Port of London Assurance Company's Case*. (b)

Mr. Giffard, in reply, cited the cases of *Re Phoenix Life Assurance Company*, (c) and *Ex parte Morgan*, (d) * and * 35 argued that what took place at the public meetings had reference to the agreement of July, 1856, and not to the arrangement ultimately carried into effect; that the intention of the agreement

(a) 31 L. J. N. S. Ch. 861.

(b) 5 De G., M. & G. 465.

(c) 2 Johns. & H. 441.

(d) 1 Mac. & G. 225.

of July, 1856, was, that the Saxon debts should be paid out of the Saxon assets, and not by the Era Company, and that on making the order for winding up the Saxon Company in the terms in which it had been made, the Court did not intend to intimate any opinion as to the validity of the sale, but simply to reserve the question of the validity of the agreement.

Judgment reserved.

November 21.

THE LORD JUSTICE KNIGHT BRUCE.—This case was brought before us by way of appeal from an order made by the Vice-Chancellor WOOD, and, as it came before his Honor, is, with the judgment delivered by him, reported by Mr. Vaughan Johnson and Mr. Hemming.

The appeal is that of Mr. Croysdill, the official manager under the order made in the year 1858 for winding up the Era Company, and is from the refusal of the Vice-Chancellor to accede to an application by Mr. Croysdill, which, directed against the deed of the 1st of August, 1857, mentioned frequently during the argument, had for its object that the Court should treat that deed as not binding on the Era Company or its members or property, and act accordingly.

The appeal having been fully and ably argued here, we are to say whether, in our opinion, the application should have been and should now be successful. It appears to me that the deed,
 * 36. following as it did and *grounded as it was upon the several proceedings and acts of July, 1856, and January, 1857, which are in evidence, bound and does bind the Era Company and the Saxon Company and their members and estates respectively; that the deed, if not thus binding originally, became so in or before the year 1859 by acquiescence and conduct; and that the application refused by the Vice-Chancellor, made as it first was after that year, if it could have properly succeeded at any time, was too late. It is impossible for us (I think) with propriety, now to act against the deed or disturb the arrangement made by it.

The appeal in my judgment fails.

The Lord Justice TURNER, after stating the facts as set out above, said:—

I agree in the conclusion at which the Vice-Chancellor has arrived. The appellant's case cannot, as it seems to me, be maintained upon any other ground than that the deed of the 1st of August, 1857, is absolutely void so far as the Era Company is concerned. If the deed be not absolutely void it must, as I conceive, prevail so long as it is in force, and upon the evidence before us there is nothing, so far as I can see, to impeach it.

It is said, however, that it is absolutely void, as being *ultra vires* as to both the companies. Whether it may be so or not as to the Saxon company, I do not think it necessary to give, and do not give, any opinion; but, looking to the deed of settlement of the Era Company, and particularly to the 13th and 38th clauses of that deed, I think it was within the power of that company, with the consent of a general meeting, which appears to have been obtained, to enter into the agreements and *bind themselves * 37 by the deed made and entered into between them and the Saxon Company. The 13th and 38th clauses provide: [His Lordship read them.] It was said that the Era Company had no power to take to the assets and subject themselves to the liabilities of the Saxon Company, but these were the terms of the purchase, and if the company had power to purchase, it must have been competent to them to agree upon the terms.

That the Saxon Company may not have had power to sell does not seem to me to affect the case. Assuming that they had no such power, the only consequence, as I apprehend, would be that the Era Company bought the property with a bad title, but they completed the purchase, their title has never been disturbed, and their remedy would, as I conceive, be upon the covenants in their purchase-deed, which indeed seems to me to have been prepared with a view to this very difficulty, for upon examining the deed I find that there are no covenants in it on the part of the Saxon Company, but that the covenants on their part are entered into by some of their shareholders, who are made parties to the deed evidently for that purpose. This circumstance appears to me to have a material bearing upon the question we have now to determine. If, according to the terms of the deed, the Saxon Company was not to be liable to the Era Company under the covenants, it is very difficult to see how it can be made liable to the official manager of the Era Company under the winding-up order, unless, indeed, the deed be set aside, for which, as I have said, there is no pretence.

Upon these grounds, without entering into the effect of the position of the Saxon Company having been changed, on * 38 which the Vice-Chancellor so much relied, * and in which I am disposed to agree with him, although I do not desire to give any final opinion upon it, as I do not consider it necessary to do so, my opinion is that this appeal ought to be dismissed, and with costs.

GILBERT v. LEWIS.

1862. November 18, 20. December 2. Before the Lord Chancellor Lord WESTBURY.

A mere devise to a woman for her sole use and benefit does not sufficiently indicate an intention to limit the devised property to her separate use.¹

Where a married woman sues by her next friend, a demurrer *ore tenus* to the constitution of the suit, on the ground that the property in question was not limited to her separate use, cannot be taken when there is a demurrer on the record to part of the bill only.²

A bankrupt who has been engaged in a fraudulent transaction may be made a party to a bill for discovery, but if the discovery is ancillary to relief improperly sought against him, he may demur, and the delivery up of documents which the bankrupt only holds for his assignees is not relief in respect of which it is necessary to make him a party.³

THIS was an appeal from the decision of Vice-Chancellor Wood, reported in the 2d volume of Messrs. Johnson & Hemming's Reports, (a) allowing a demurrer to a part of the bill which was filed by a married woman, by her next friend, against her husband one John Hunter and the official and creditors' assignees of his estate in bankruptcy as defendants, and made the following case:—

The plaintiff's former husband George Philip Bradley, being at the time of his will and death entitled to the reversion or remainder in fee-simple expectant on the death of his mother Phœbe

(a) Page 452.

¹ See 2 Jarman Wills (3d Eng. ed.), 22, note (b); Schouler Dom. Rel. 189, 190; Arthur v. Arthur, 11 Irish Eq. 511; Archer v. Borke, 7 Irish Eq. 478; Massy v. Rowen, L. R. 4 H. L. 288.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 588, 589.

³ See 1 Dan. Ch. Pr. (4th Am. ed.) 157, 158, 547, 548, and notes.

Bradley in certain freehold hereditaments in Staffordshire, by his will dated the 17th of February, 1842, devised and bequeathed all his real and personal estate to the plaintiff "for her sole use and benefit."

He died on the 23d of July, 1843, and Phoebe * Bradley * 39 on the 6th of August, 1846, shortly after which latter event the defendant Hunter entered into possession or receipt of the rents and profits of the property in question.

The bill stated that the defendants Hunter, Lewis and Graham alleged that Hunter became entitled, on the death of Phoebe Bradley, to such possession or receipt as aforesaid in manner following, namely: —

That George Philip Bradley and John Bradley his late father being entitled in equal shares to the reversion or remainder in fee-simple expectant on the death of Phoebe Bradley in the property in question, by an indenture dated the 22d of March, 1828, granted an annuity of 100*l.*, secured by the creation of a term of 2000 years in the property, with powers of sale in case of default in payment.

That by an indenture dated the 2d of August, 1837, the annuity was assigned to the Earl of Strathmore, and the property to Hunter as a trustee for the earl for the residue of the term.

That by an indenture dated the 4th of August, 1837, for the valuable considerations therein mentioned paid by George Richards Elkington to the earl, Hunter, by direction of the earl, sold and assigned the property to Elkington for the residue of the term.

That by an indorsed indenture dated the 5th of April, 1841, reciting that the therewithin-mentioned purchase-money paid by Elkington to the earl was the proper money of Hunter, and that the property was assigned to * Elkington as a trustee * 40 for Hunter, Elkington assigned the property to Hunter for the residue of the term.

But the plaintiff charged that the whole of the transactions carried into effect by the several deeds was a fraudulent contrivance on the part of Hunter to obtain the hereditaments without payment of the value thereof, and that the several deeds were fraudulent and void and ought to be set aside and cancelled; that the deed of the 22d of March, 1828, was made without consideration, and that the pretended consideration therein mentioned did not in fact

pass, and that the same deed was made really for the benefit of Hunter, and was fraudulently contrived by him; that the assignment of the 2d of August, 1837, was fraudulent and merely colourable, and that the same was made really for the benefit of Hunter, and that no consideration for such assignment really passed; that the deed of the 4th of August, 1837, was fraudulent and merely colourable, and was made without consideration or for a grossly inadequate consideration, and that the pretended consideration was not in fact paid, and that the assignment and sale or transfer were really one transaction and really contrived for the benefit of Hunter, and that the sale was in effect, in contemplation of equity, a sale by a mortgagee with a power of sale to himself, and was a fraud on the power of sale in the annuity deed.

The bill then stated, that at and before the date of the annuity deed, Hunter was an attorney and solicitor, and was the attorney and solicitor of John Bradley and George Philip Bradley, and that he acted for them as such in and about the preparation and execution of that deed, and that he continued and was their attorney and solicitor down to and at the date of the deeds of the 2d and 4th of August, 1837, respectively; that the

* 41 * earl and other parties to the deeds in question were, at the dates of the several parts of the transactions aforesaid in which their respective names were used, clients of Hunter, and that they respectively acted therein under his influence and for his benefit, and were, as part of the fraudulent contrivance of Hunter, induced by him to lend their names in manner therein-before appearing; that as such attorney and solicitor of George Philip Bradley and John Bradley, Hunter obtained possession of the deeds and evidences of title relative to the property, and that they or one of them, together with the four deeds therein particularly mentioned and together with other documents relating to the matters aforesaid, were then in his possession, custody or power; that Hunter was adjudicated bankrupt on the 29th of October, 1861, and that Graham was the official and Lewis the creditors' assignee of his estate under his bankruptcy; that Hunter alleged that there would be a large surplus coming to him under his bankruptcy after payment in full of all his creditors, and that he insisted, and that Lewis and Graham admitted, that for this and other reasons the term in the property was not vested in them as assignees; that

Hunter had studiously concealed from the plaintiff, in furtherance of his fraudulent contrivance, the facts and circumstances relative to the purchase of the property, and that he had retained possession or continued in receipt of the rents and the profits until the appointment of his assignees, shortly after which they entered into the like possession or receipt, and had since continued and were then in such possession or receipt.

And after stating that since the death of George Philip Bradley the plaintiff had married the defendant William Henry Gilbert, and that no settlement or agreement * for a settlement * 42 of the property had been made before, upon or since such marriage, the bill prayed for a declaration that the deeds of the 22d of March, 1828, and the 2d and 4th of August, 1837, respectively, were fraudulent and void, and ought to be set aside, and that they might be delivered up and cancelled; or that the defendants, Lewis, Graham, and Hunter, might be decreed to reassign the property for the residue of the term, free from the annuity and from encumbrances created by them or either of them; that the plaintiff might be let into possession of the property or into the receipt of the rents and profits thereof; that the defendant Hunter might be decreed to deliver up all deeds and evidences of title relating to the property, and to pay the costs of the suit, and for further or other relief.

The defendant Hunter put in a demurrer for want of equity to so much of the bill as sought that it might be declared that the deeds of the 22d of March, 1828, and the 2d and 4th of August, 1837, respectively, were fraudulent and void, and ought to be set aside, and as sought, that the same might be decreed to be delivered up and might be cancelled accordingly, and as sought, that the defendants Lewis, Graham, and Hunter might be decreed to reassign the hereditaments in the bill mentioned to the plaintiff, or as she might direct, for the residue of the term, and free from the annuity in the bill mentioned and from encumbrances created by the said defendants, or either of them, and as sought, that the plaintiff might be let into possession of the said hereditaments or into the receipt of the rents and profits thereof, and, as sought, that the defendant Hunter might be decreed to pay the costs of the suit, and as sought, that any directions or inquiries might be given or made, or that the plaintiff might have any further or

* other relief in the suit as to such part thereof as was * 43

thereby demurred to ; and also as to so much of the discovery sought from the defendant Hunter by the bill as was sought or inquired after by the interrogatories to the said bill numbered respectively, &c.

Mr. Giffard and Mr. Reilly, for the appellant, in support of the bill. — A preliminary question was discussed on the suggestion of the Lord Chancellor as to the constitution of the suit with reference to the sufficiency of the expression “for her sole use and benefit” in the will of George Philip Bradley, for the purpose of giving Mrs. Gilbert a separate estate, and the following cases were cited on the point: *Lindsell v. Thacker*, (a) *Massey v. Parker*, (b) *Adamson v. Armitage*, (c) *Blacklow v. Laws*, (d) *Tullett v. Armstrong*, (e) *Ex Parte Ray*, (g) *Cox v. Lyne*, (h) *Ex Parte Killick*; (i) and as to the suit of a married woman, the husband being a party as defendant, *Davis v. Prout*, (k) was referred to as a case in which the record was ultimately brought into the same situation as the present.

[*Mr. Lee, amicus Curiae*, referred to *Tyler v. Lake*. (l)]

Upon the rest of the case the arguments in support of the bill were to the following effect: A bill for relief and discovery is maintainable against a bankrupt, notwithstanding his bankruptcy, where there is fraud and the bill seeks payment of costs in * 44 respect of it. The * plaintiff's right is not barred by the bankruptcy, because the costs to be recovered in such a suit could not be proved under the bankruptcy. Originally, no costs could be proved against a bankrupt unless a decree and order for taxation had been made. That state of things was changed by 6 Geo. 4, c. 16, § 58, re-enacted by the Bankrupt Law Consolidation Act, 1849, § 181. But even now, to make costs provable, there must have been a decree before the bankruptcy. The 149th section of the Bankruptcy Act, 1861 (under which, as appears from the bill, this bankruptcy took place), does not affect the question. It was introduced with respect to process for contempt, and is traceable to the Insolvency Act, 1 & 2 Vict. c. 110. Then

(a) 12 Sim. 178.

(b) 2 Myl. & K. 174.

(c) 19 Ves. 416; G. Coop. 283.

(d) 2 Hare, 49.

(e) 4 Myl. & Cr. 390.

(g) 1 Madd. 199.

(h) Younge, 562.

(i) 3 M., D. & De G. 480.

(k) 7 Beav. 288.

(l) 2 Russ. & Myl. 183.

as to discovery : the bill is sustainable on the ground that otherwise there would be defeat of justice by the incidental operation of bankruptcy, which is intended for the distribution of assets among the creditors, and for the relief of the bankrupt from personal liability. The principles on which this bill is sustainable will be found in the treatise of Lord Redesdale, (a) who says : " A bankrupt made party to a bill against his assignees touching his estate may demur to the relief, all his interest being transferred to his assignees ; but it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees ; and otherwise the bankruptcy might entirely defeat justice." On the first clause of which sentence Mr. Jeremy has this note : " But it seems that if fraud were charged and costs were prayed against him he could not demur." In *Lloyd v. Lander*, (b) where a demurrer by the bankrupt was * allowed, the Vice-Chancellor intimates that, * 45 had there been a charge in the bill specially directed against the bankrupt, the bill would have been sustainable. It is incorrect to say that the bankrupt has no interest in the suit. On the ground of fraud, a bankrupt may be brought here for the purpose of being ordered to pay costs which the plaintiff cannot otherwise obtain, and for the delivery up of documents. Again, the bankrupt by his pleading excepts from his demurrer the paragraph of the prayer of the bill which relates to the possession of the deeds and consequently admits that the plaintiff is entitled to some relief, and therefore he must give discovery. The discovery sought is ancillary as much to that as to the other part of the case. If therefore the bill is sustainable for relief, it is sustainable for discovery ; otherwise there will be a complete failure of justice ; and in the present case the fraud alleged is fraud committed by an officer of this Court, a solicitor.

[THE LORD CHANCELLOR. — The plaintiff must have in his bill allegations to show, that unless the discovery sought is given, there will be failure of justice. Otherwise, the ordinary discovery being only ancillary to the relief, if he is entitled to no

(a) Mitf. Pl. 161.

(b) 5 Madd. 282.

relief, he is entitled to no discovery. Where are the allegations to this effect?]

They are not there in so many words, but they are in substance. It is usual in these cases to say that the bankrupt is a mere witness. The answer to that is, that we could not by ordinary examination get these facts from him, and we want discovery. *King v. Martin.* (a)

[THE LORD CHANCELLOR. — There the bill stated the existence of a supersedable bankruptcy.]

At all events the Court will look to all the circumstances, in order to prevent a failure of justice; and although we have
* 46 not alleged in so many words, we have alleged in * substance that the assignees know nothing of the matters in dispute and can give us no discovery, but that the bankrupt can, and that it is proper that he should do so. *Dummer v. The Corporation of Chippenham.* (b)

Mr. Rolt and *Mr. Dickinson*, for the demurring defendant, were not called upon.

THE LORD CHANCELLOR. — I will look into the bill, and if I find any allegation in it which would entitle the plaintiff to relief, I will call upon the other side. If I find no such allegation, I will give judgment in a few days.

December 2.

THE LORD CHANCELLOR. — This is a singular bill, and met by a defence equally singular.

The plaintiff sues as a married woman by her next friend, claiming separate estate in some freehold property, which is the subject of the suit. The object of the suit is to reduce or set aside a charge affecting that freehold property. The whole right to sue depends, therefore, upon the fact of the property being well limited to the separate use of the plaintiff.

The title of the plaintiff to the alleged separate estate
* 47 depends on the will of her former husband. At the * time

(a) 2 Ves. Jr. 641.

(b) 14 Ves. 245.

of making that will and of his decease he was seised in fee-simple in remainder expectant on the decease of a tenant for life of certain freehold estate. By the will he devised all his real and personal estate to the plaintiff, then his wife, for her sole use and benefit. There is no trust created by the will. There are no words indicative of exclusive enjoyment beyond those that I have mentioned. There is no such machinery, in short, provided by the will as is requisite in effect for the creation or, at all events, for the administration of the separate estate of a married woman. The devise is a legal devise, and the proposition is, that the words "for her sole use and benefit" manifest a clear intention on the part of the testator, that in the event of subsequent coverture of his widow she should be entitled to a separate interest in the property.

There is not, as far as I am aware, any single case of a will containing simply these words, in which they have been made the foundation of a decision, that the devisee took a separate estate.

The nearest authority is that of *Adamson v. Armitage*, (a) before Sir W. GRANT. But in that case money was directed to be vested in trustees, whom the executors should choose and name, the income arising therefrom to be for a woman then unmarried "for her sole use and benefit." There was the machinery of the trustees and the direction to pay the income to the individual. The point does not appear to have been much argued, and Sir W. GRANT decided that the words would give a separate interest, citing a case of *Jones v.* — as stated in the text in Vesey, (b) which appears to have been the case of *Johnes v. Lockhart*, mentioned in a note to the * report in the 5th volume of Vesey's Reports. (c) * 48 But it turns out that the case of *Johnes v. Lockhart* was erroneously cited in the place referred to by Sir W. GRANT, and that it is a decision for the very opposite conclusion to that for which it was referred to.

There is no other case where these simple words "sole use and benefit" occur that I am aware of, except the case of *Cox v. Lyne* reported in Mr. Younge's Reports, (d) and most erroneously reported, for nothing of such a kind was decided in that case as is

(a) 19 Ves. 416; G. Coop. 283.

(b) Vol. 5, p. 520.

(c) Page 520; and see Belt's note to 3 Bro. C. C. 383, referred to in the note to the second edition of 5 Ves. 520.

(d) Page 562.

stated in the report of it. The incorrectness of that report has been commented upon by Lord COTTENHAM in the case of *Tullett v. Armstrong*. (a)

There are, indeed, many other cases in which there have been words superadded to the words "sole use and benefit," as, for example, the case of *Ex parte Ray*, (b) where the words were "sole use, benefit and disposition." But the case of *Ex parte Ray* (b) was one in which the words occurred in a marriage settlement as the terms of a contract between an intended husband and wife. There is no case of a will containing a disposition to a woman, either single or becoming discovert immediately on the death of the testator, in which these simple words, unconnected with a gift to trustees, have been made the foundation of a decision that the devisee takes a separate estate. I entirely concur in the observations of Lord BROUGHAM in the case of *Tyler v. Lake*, (c) that the words to exclude the operation of the legal rule, transferring

the estate to the husband upon subsequent coverture,
 * 49 must * be clear and afford no room for doubt as to the intention of the testator.

I should have had no difficulty in ruling, therefore, that these words do not confer upon the plaintiff a separate estate; and, if so, the position of the ownership of the property in question would be this, that her husband and herself would be seised of the estate in right of the plaintiff, but that the plaintiff alone would be unable to maintain the suit.

From the singularity of the defence, however, I am unable to make the ground that I have mentioned the reason for my decision. For if it were available to the defendant, it must be used by him as a ground of demurrer *ore tenus*. But it is ruled that no demurrer *ore tenus* can be more extensive than the demurrer on the record. Now the demurrer on the record is to a part only of the bill, with an answer to the rest, thereby admitting, so far as the portion which is answered is concerned, that the plaintiff has a capacity to sue. It is, therefore, impossible to allow the defendant to avail himself of this objection to the bill, by reason of the form of defence.

I proceed, consequently, to consider the nature of that defence, which is a demurrer to part of the bill, and an answer to the rest of the bill.

(a) 4 Myl. & Cr. 390, 403. (b) 1 Madd. 199. (c) 2 Russ. & Myl. 183.

The bill states that the testator was fraudulently induced by a person of the name of Hunter to join in charging an annuity on the estate in question, and there are allegations, in various forms, to the effect that the annuity deeds were the result of a fraudulent contrivance, and were fraudulently obtained. But the circumstances constituting that fraud are nowhere stated. Fraud is a * conclusion of law, and it is insufficient to allege that * 50 a deed has been obtained by fraud, unless the acts constituting the fraud are stated on the face of the bill.¹ There is here not one single allegation of any fact constituting fraud, or tending to establish a case of fraud, except an allegation that the deeds were without consideration, and that the consideration did not pass, whatever may be the meaning of those words.

The fraud thus imperfectly stated is ascribed to the defendant Hunter, the demurring defendant, who was an attorney, but who obtained these deeds for his own benefit. He has since become bankrupt, and the singular character of this bill is, that the relief prayed for the reduction or setting aside of these deeds is prayed against Hunter, as well as against his assignees.

I am by no means disposed to hold, that a bankrupt who antecedently to his bankruptcy has been engaged in a fraudulent transaction, whereby he has acquired property, may not be made a party to a bill for discovery, even although the property has been transferred by law to his assignees. But then the bill must be constructed for the express purpose of obtaining that discovery from the bankrupt. If the discovery sought from the bankrupt is sought merely as incidental to relief, then he, not being a necessary party in respect of that relief, may demur to the portion of the bill seeking it, and therefore to the discovery, which is sought merely as incidental to it.² The singularity of the present demurrer is, that whereas it might have been a demurrer to the whole bill, the demurring defendant excepts from the demurrer one allegation, which is, that the annuity deeds are in the possession of the bankrupt, and also one portion of the prayer, which is, that the deeds in the possession of the bankrupt may be delivered

¹ See *Other v. Smurthwaite*, L. R. 5 Eq. 437, 441; *Crocker v. Higgins*, 7 Conn. 342; *Hogan v. Burnett*, 37 Miss. 617; *Howell v. Sebring*, 1 McCarter (N. J.), 84, 90; *Parsons v. Heston*, 3 Stockt. (N. J.) 150; *Grove v. Rentch*, 26 Md. 367, 377; 1 Dan. Ch. Pr. (4th Am. ed.) 324.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 547, 548, and notes.

* 51 up to the plaintiff. The * possession of the bankrupt is the possession of the assignees, and it was unnecessary in respect merely of that possession to make the bankrupt a party. However, the bankrupt demurring to the rest of bill excepts that particular portion of the relief, and of the discovery incidental thereto, and I cannot say, that his partial demurrer is bad because he might have put in a general demurrer instead of that limited demurrer.

But then my attention was called to two grounds of argument by *Mr. Giffard* and *Mr. Reilly*, one of which was of this nature. *Mr. Giffard* said, that the bankrupt has demurred to a considerable portion of that discovery, which is necessary to be made in order to show why the bankrupt is made a party in respect of that portion of the case which is excepted from the demurrer. His argument, therefore, was, that the demurrer was too extensive as comprehending a discovery which was incidental to the part excepted out of the operation of the demurrer.

I am not of that opinion. If the bankrupt could with propriety be made a defendant to this bill, in respect of an allegation, that he had the deeds in his possession, the only discovery that could be required from him — (and his answer would have been sufficient if limited only to that discovery) — would have been, an answer to the inquiry whether the deeds were or were not in his possession. I do not think, therefore, that the demurrer is open to any objection upon that ground.

It was then said that the plaintiff had a right to make the bankrupt a party to a bill for discovery, in respect of his having engaged in the transaction, being a solicitor.

* 52 But the answer to that is, that he engaged in the * transaction for his own benefit as principal. It is perfectly true, that a solicitor who is implicated in a case of fraud may be made a party to a bill seeking relief in respect of that fraud, merely for the purpose of discovery, the only relief asked against him being, that he should be ordered to pay the costs.¹ But that is not the nature of the case made by this bill against *Mr. Hunter*, nor is the character of solicitor the only one in which he is represented to have been implicated in this transaction.

I, therefore, must affirm the order which has been made in the Court below, and dismiss this petition of rehearing with costs.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 298.

DICKENSON v. TEASDALE.

1862. December 9. Before the Lord Chancellor Lord WESTBURY.

A testator by his will charged all his real estate with payment of his debts, if his personal estate was insufficient to pay them, and directed his executors to raise sufficient for their payment by mortgage or otherwise. *Held*, that this did not create an express trust within the exception contained in the Statute of Limitations, 3 & 4 Will. 4, c. 27.¹

An acknowledgment by a devisee does not prevent his co-devisee from pleading the statute.²

It is sufficient to plead the 3 & 4 Will. 4, c. 27, to a bill seeking the benefit of a trust without also pleading the Statute 3 & 4 Will. 4, c. 42.

THIS was an appeal from the decision of the Master of the Rolls, holding that a direction to executors to raise money to pay debts did not create an express trust so as to be within the exception in the Statute of Limitations, 3 & 4 Will. 4, c. 27.

The plaintiff claimed to be a bond creditor of John Teasdale the testator in the cause. The bond was dated the 9th of November, 1810, and was conditioned for payment to William Robson, his executors, administrators, or assigns, of a sum of 430*l.* 15*s.*, with interest.

* The testator by his will dated the 30th of January 1811, * 53 devised to his nephew the defendant John Teasdale, his heirs and assigns for ever, a certain part of the testator's real estate at Farlam in the county of Cumberland, subject to the payment of the several annuities, legacies and bequests thereafter bequeathed; and after bequeathing certain annuities and legacies, the testator charged the above part of the said premises with payment of half his just debts and funeral expenses in case his personal estate should fall short, and with the payment of one-half of the mortgage money and interest then charged upon the whole of his real property, and also with the payment of one-half of the annuities and legacies thereafter given to his nephews Joseph Teasdale and James Teasdale. And the testator devised unto his nephew Henry Proud, his heirs and assigns for ever, all the remaining part of the testator's real estate at Farlam, subject to the payment of the

¹ See *Lewin Trusts* (5th Eng. ed.), 634, 635.

² See *Coope v. Creswell*, L. R. 2 Ch. Ap. 112, 126.

several annuities, legacies and bequests thereafter given and bequeathed ; and after bequeathing certain other annuities and legacies, the testator charged the last-mentioned part of the premises with payment of half his just debts and funeral expenses in case his personal estate should fall short, and with the payment of one-half the mortgage money and interest then charged upon the whole of his real property, and also with the payment of one-half of the annuities and legacies thereafter given to his nephews Joseph Teasdale and James Teasdale ; and after bequeathing certain annuities and legacies to Joseph Teasdale and James Teasdale, the testator bequeathed all his personal estate unto and equally to be divided between John Teasdale the younger and Henry Proud, subject to the payment of the testator's just debts and funeral expenses, and the probate of his will ; and in case the same should

be found insufficient for that purpose, then the testator * 54 * charged all his real estate, whatsoever, with the payment thereof, and directed his executors thereafter named to raise such sum as might be sufficient by mortgage or otherwise of his said real estate ; and he appointed Sarah Proud, Robert Hodgson and William Hutchinson executrix and executors of his will.

The testator died on the 1st of April, 1811, and, Robert Hodgson and William Hutchinson having respectively renounced probate, Sarah Proud alone proved the will on the 10th of August, 1811.

The testator's personal estate was insufficient to pay, and was exhausted in paying, his funeral and testamentary expenses.

Upon his death, John Teasdale the younger and Henry Proud entered into and had retained possession of the respective portions of the real estate devised to them by the will.

William Robson died in May, 1830, having by his will appointed his daughter, the plaintiff Mary Dickenson, his sole executrix, and she had proved the will.

On the 28th of October, 1848, Sarah Proud died, having survived her co-executors, and at the date of the institution of the suit there was no legal personal representative of the testator John Teasdale.

The sum of 430*l.* 15*s.* due upon the bond remained wholly unpaid ; but the bill alleged that John Teasdale the younger from time to time made divers payments on account of the interest on

the bond, the last of such payments being made on the 12th of February, 1845, and that on the 9th of December, 1857, Henry Proud paid * a sum on account of the interest on the * 55 bond; and, further, that a sum of 1350*l.* was due to the plaintiff from the defendants for principal and arrears of interest upon the bond debt

The bill charged, that according to the true construction of the will of John Teasdale a trust was thereby created for payment of his debts out of the real estate thereby devised, and that the defendants John Teasdale the younger and Henry Proud, upon taking possession of the testator's real estates, became and remained thereafter bound to execute such trust, and that the same ought to be executed for the benefit of the plaintiff under the direction of the Court. Further, that if the will did not create a trust for the payment of the testator's debts out of his real estate, such debts were thereby made a charge upon such real estate, and that such charge had been kept alive for the benefit of the plaintiff by the above-mentioned payments on account of the interest of the bond debt.

The prayer of the bill was, that the defendants John Teasdale the younger and Henry Proud might pay to the plaintiff the bond debt of 430*l.* 15*s.* and the arrears of interest payable in respect thereof and the costs of the suit, or that all proper directions might be given for raising such bond debt, interest and costs out of the real estate devised to the defendants by the will of the testator John Teasdale, and for a receiver, if necessary.

To the relief sought by this bill, other than and except such parts of the bill and interrogatories as sought a discovery as to the payments alleged to have been made by Henry Proud on the 9th of December, 1857, on account of the interest on the bond debt, the defendant Henry Proud pleaded the Statute of Limitations, 3 & 4 * Will. 4, c. 27, and averred that neither he nor any * 56 agent of his made any payment or acknowledgment within twenty years before the filing of the original bill in the suit; and with reference to the part of the bill not covered by the plea, he answered admitting a payment of 5*l.* to the plaintiff's son on the 9th of December, 1857, but not on account of the bond debt.

The plea came on for argument before the Master of the Rolls on the 8th of November, 1862, and was allowed by his Honor.

The case is reported in the 31st volume of Mr. Beavan's Reports. (a)

The plaintiff appealed.

Mr. Kay, for the appellant. — The first question is, did the will create an express trust within the 25th section of the 3 & 4 Will. 4, c. 27, by which it is enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* or any person claiming through him to bring a suit against the trustee, or any person claiming through him, to recover such land or rent shall be deemed to have first accrued at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. Here we have not a power merely given to the executors, if they find the personal estate insufficient, but it is imperative upon them to raise the * 57 money. This makes * the power in effect a trust. The state of the law before the statute was passed is discussed in *Bailey v. Ekins* (b) and *Hargreaves v. Michell*, (c) in the latter of which cases Sir JOHN LEACH says, "The Statute of Limitations does not run against a trust, and a charge is a trust to be executed by a devisee or heir." The interpretation clause of 3 & 4 Will. 4, c. 27, extends the meaning of the word "land" to all corporeal hereditaments and to any estate, share or interest therein, and the power to raise the money is an interest in land, and is held in trust for the creditors. The cases as to a charge and a trust are cited by Lord ST. LEONARDS in his Treatise on the New Real Property Statutes, (d) and the principles to be gathered from the cases of *The Commissioners of Charitable Donations v. Wybrants*, (e) *Hunt v. Bateman*, (g) *Dundas v. Blake*, (h) *Young v. Lord Waterpark*, (i) *Cox v. Dolman*, (k) *Snow v. Booth*, (l) *Doe d. Rawlings v. Walker*, (m) *Knight v.*

(a) Page 511.

(b) 7 Ves. 319.

(c) 6 Madd. 326.

(d) Page 110 (2d ed.)

(i) 13 Sim. 204; S. C. on appeal, 15 L. J. (N. S.) Ch. 63.

(k) 2 De G., M. & G. 592.

(l) 8 De G., M. & G. 69.

(e) 2 Jo. & Lat. 182.

(g) 10 Ir. Eq. 360.

(h) 11 Ir. Eq. 138.

(m) 5 B. & C. 111, 118.

Bowyer, (a) *Tasker v. Small*, (b) and *Jacquet v. Jacquet*, (c) when considered together, support the plaintiff's case. It would be a narrow construction of this statute to apply it only where an actual estate given is to the trustees. Here, the executor must exercise the authority. He has no discretion. Before the statute the charge was a trust and would not have been barred as against the land. The real question is, whether this is such an interest in the trustee as brings him within the section. Now there is here not only a charge, but something else, namely, the direction to the executors to raise sufficient * money for payment of the * 58 debts by mortgage or otherwise of the real estate. This amounts to a trust, and if we were proceeding against the executrix, we should have had a remedy against her for breach of trust, which, of course, would not have been barred by the lapse of time. Here, it is true, that there is no personal representative, but the rule is, that a trust never fails for want of a trustee. In *Lewis v. Duncombe*, (d) where a term was limited to trustees to secure an annuity, the Master of the Rolls said, "It is not in my opinion necessary to compel the trustees who have the right to execute the trust to take such steps as may be necessary to enable them to take possession, because the trust has in fact been executed by the Court instead of the trustees."

Moreover, the Statute 3 & 4 Will. 4, c. 42, § 3, should have been but is not pleaded, and, therefore, on this ground, the plea must be overruled. Nor does the plea go to the whole relief. It admits that this defendant has not, but states that the other defendant has, made payments on account of this debt; and *Roddam v. Morley* (e) shows that an obligation upon several persons may be kept alive by an acknowledgment by one of them. The plea, therefore, admits too much for its success.

Mr. Hobhouse and *Mr. Brodrick* (A.), for the defendant Henry Proud, were not called upon.

THE LORD CHANCELLOR. — I have listened with pleasure to the argument of *Mr. Kay*, but I am bound to decide against it with-

(a) 2 De G. & Jo. 421.

(d) 29 Beav. 175.

(b) 6 Sim. 625.

(e) 1 De G. & Jo. 1, 9.

(c) 27 Beav. 332.

out hesitation, as it would be productive of great mischief
 * 59 * if I permitted any doubt to remain upon the question, so far as my judgment is concerned.

It must be admitted on behalf of the plaintiff that he is entirely barred by the 3 & 4 Will. 4, c. 27, unless his right is saved by virtue of the 25th section. I will presently come to the minor points. His principal contention was, that this section applied to the case. But in order to bring this case within the saving clause, he must show that the land which he seeks to affect or that some estate or interest therein was vested in a trustee upon an express trust to the benefit of which he is entitled.

The words "express trust" in the statute are used by way of opposition to trusts arising by implication, trusts resulting or trusts by operation of law. Two things must combine here; there must be a trustee with an express trust, and an estate or interest in lands vested in the trustee, and which therefore the trust must affect. The subject-matter of the trust is to be dealt with in conformity with the trust.

That brings the case to this inquiry: Is any estate or interest given by this will to the individuals denominated trustees on an express trust for the benefit of creditors?

There is nothing more important than to adhere with accuracy to the use of words of established meaning in legal nomenclature, and nothing is better established in legal nomenclature than the difference between a power and an estate. Powers may be divided according to the classification of Lord ST. LEONARDS into powers appendant and powers in gross or simply collateral.

A power collateral is of the nature of an authority to
 * 60 * deal with an estate, no interest in which is vested in the donee of the power. A power of that nature is wholly different from an estate or interest, and cannot without abuse of language be so designated. It may be conceded that such a power may in one sense be the subject of a trust, that is, it may be coupled with an obligation as to its exercise; and there may be a person entitled to insist on the performance of the obligation; and therefore by a metaphorical and incorrect use of language, such a power may be called the subject of a trust, the donee may be described as a trustee, and the person calling for the exercise of the power may be termed a *cestui que trust*. But if this be con-

ceded, the subject-matter of the trust still remains in its integrity as a simple power or authority to be distinguished from an estate or interest.

The words in the 25th section are "land or rent," and the interpretation clause substituting "any share, estate or interest in land" for "land" in the 25th section, the question is: Did the executrix take under this will any share, estate, or interest in the land? We come therefore to an examination of the will.

In a variety of decisions a direction to do an act has been held to give by implication the estate required to be dealt with, in order to comply with the direction. If this will were within that rule, there would be no difficulty in saying that the executrix took an estate and interest for the purpose of executing the power, which would bring the case within the 25th section. But the whole construction of the will forbids me to arrive at such a conclusion.

The will may be stated thus, that a moiety of the debts are charged on certain parts of the property, and * then the * 61 other moiety of debts are charged on the other portion. These testamentary dispositions are followed by the bequest of certain annuities and legacies, and by a bequest of the testator's personal estate, subject to the payment of his debts and funeral and testamentary expenses, and in the event of the same being found insufficient for that purpose, the testator charges all his real estate whatsoever with the payment thereof, and directs his executors to raise such sum as might be sufficient by mortgage or otherwise of his real estate. It is impossible for me, having regard to the antecedent specific devises, to come to any other decision than that the words create simply an authority, — a collateral power, — in the executors to whom no estate or interest is given, and that the antecedent dispositions of the will render it impossible that an estate should be so given to the executors as to enable them to execute the authority by means of an interest given by implication for the purpose. Therefore here is a charge coupled with a collateral authority given to the executors in a particular event to raise by mortgage or otherwise (which would include a sale), such moneys as would answer the amount of the debt left after the personalty was exhausted.

It was properly argued that a power for such a purpose is equivalent to an estate, because the power is capable of being used

so as to effect the same object as if the estate had been given. And in point of principle I agree with *Mr. Kay*, that there is little reason in distinguishing between a trustee with an estate charged with a duty and a person with a power enabling him equally well to discharge that duty, and, therefore, as I said during the argument, if it had been possible to enlarge the language of the statute there would have been no objection in reason to hold that

* 62 the donee of * a power in the nature of a trust, for the benefit of an individual, ought to be considered as having an interest in the property subjected to the trust, and that the person having the right to call for the exercise of the authority should be in the position of a *cestui que trust*. But the answer to all that is, that the legislature has not thought proper to include the case within the words employed. Were I to extend them, and confound a power and an interest, — an authority and an estate, — I should be overstepping the limits of judicial interpretation and adding new words to the statute.

I am compelled to hold that this is not a case falling within the exception or within the language of the 25th section, and therefore the bar to the remedy of the plaintiff by a charge on the lands is complete by lapse of time.

The question remains then, whether there was any objection to the plea by reason of the Statute of 3 & 4 Will. 4, c. 42, not being in terms pleaded. That statute applies to actions of debt or covenant against devisees. But it is not the business of Courts of Equity to entertain such actions, and the object of this bill was to enforce a charge and have the benefit of an express trust. There was no necessity, therefore, to include in the plea the plea of that particular statute.

The last point relates to the acknowledgment, and it is said that an acknowledgment by one of several devisees of distinct estates extends to all the devisees under the will. But that which is totally unreasonable in point of principle derived no support from *Roddam v. Morley*, a case cited at the bar, which in its circumstances had not the remotest possible bearing on the present.

* 63 In that case there was an acknowledgment by * a devisee for life of an estate, and the question was as to the effect of such an acknowledgment as affecting those entitled in remainder to the same estate.

I have come to the conclusion that the order of the Master of the Rolls allowing the plea was right. The petition of rehearing must be dismissed and with costs.

THOMAS v. JONES.

1862. November 20, 21. December 10. Before the Lord Chancellor Lord WESTBURY.

The 8th section of the Wills Act (1 Vict. c. 26), providing that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of the Act, does not exclude the wills of married women from the operation of the 24th section, as to a will speaking as if executed immediately before the testator's death, or of the 27th, as to a general gift being an execution of a power.

Seem, that a general testamentary power given to two persons, or the survivor, of appointing an equitable estate, may be well exercised in the lifetime of both by that one who proves to be the survivor.

THIS was an appeal from a decision of Vice-Chancellor Wood holding a power to have been well executed by the will of a married woman.

The power was created by the will of Sarah Davies, dated the 12th of August, 1825, whereby, after charging annuities upon and creating life-interests in freehold and copyhold estates in Wales, she appointed, gave and devised the same to trustees and their heirs, subject to certain prior interests, to the use of such person or persons and for such estate and estates, intents and purposes, manner and form as the survivor of her three children, David Thomas Bowen Davies, John Bowen Davies and Margaretta Bowen Davies, should by any * deed or deeds or other instru- * 64
ment in writing or in and by his or her last will and testament in writing, or any codicil thereto, grant, bargain, sell, release, direct, limit or appoint or give and devise the same or any part thereof, with remainders over, under which, in the events which happened, David Thomas Bowen Davies would have become entitled, by descent, in default of such grant, limitation or appointment, gift or devise.

Sarah Davies died on the 5th of February, 1827.

John Bowen Davies died on the 11th of May, 1832, without having married, and intestate.

Margaretta Bowen Davies married David Fryer Nicholl shortly after the 17th of April, 1838, and by a settlement of that date, executed in contemplation of the marriage, David Fryer Nicholl covenanted with trustees, their heirs, executors, administrators, and assigns, amongst other things, that he would permit and suffer the last will and testament of Margaretta Bowen Davies, or any codicil or codicils thereto, to be proved in the proper Ecclesiastical Court by the executor or executrix therein named, or otherwise as the case might require, and that it should be lawful for Margaretta Bowen Davies, during the continuance of her then intended coverture, to exercise from time to time all powers of appointment of what nature or kind soever which might accrue to her during such coverture at her will and pleasure, without any control or hindrance of, from or by David Fryer Nicholl, he thereby covenanting to concur in and duly execute with her all such powers of appointment as should require such his concurrence or joint execution.

Margaretta Bowen Nicholl made her will, dated the * 65 * 18th of August, 1838, and thereby, after giving various legacies and making certain specific devises of realty, and amongst them an appointment of certain estates in Llangeler, in the county of Caermarthen, which, under the will of Sarah Davies, stood limited in the events that had happened to such uses as the survivor of Margaretta Nicholl and John Bowen Davies should appoint, made are siduary devise to the following effect, viz: As to all the rest, residue and remainder of her real and personal estate whatsoever and wheresoever and of what nature or kind soever that she might die possessed of, and not given and devised by her will (except such real and personal estate as might remain subject to the trusts of her marriage settlement by reason of no specific disposition of any part thereof having been made by her under the power for that purpose therein contained, and of which that general devise and bequest was not to be taken as in execution) she gave, devised and bequeathed the said residue for the benefit of her own children, and in case she should have no child who should survive her, then to David Thomas Bowen Davies (therein called Bowen Davies) for his life, with remainder to his

children lawfully to be begotten, and in default of such issue unto Henry and Eliza Jones, natural children of her late brother John Bowen Davies.

On the 24th of May, 1848, David Thomas Bowen Davies died, and in 1850 two creditors' suits were instituted for the administration of his estate.

On the 17th of October, 1858, Margaretta Bowen Nicholl died, never having had any issue, but leaving her husband David Fryer Nicholl surviving and without having republished the will of 1838 after the death of David Thomas Bowen Davies.

* The present suit was instituted as supplemental to the * 66 creditor's suits instituted for the purpose of administering the estate of David Thomas Bowen Davies, the plaintiff insisting that there had been no valid exercise by Margaretta Bowen Nicholl of the power given by the will of Sarah Davies, but that the estate had descended to David Thomas Bowen Davies and formed part of his assets.

The case came on for hearing before the Vice-Chancellor Wood, and is reported in the 2d volume of Messrs. Johnson & Hemming's Reports, (a) and from the decision then given the plaintiffs appealed.

Sir Hugh Cairns, Mr. Hobhouse, and Mr. Hugh Williams, for the appellants. — The first question is, What was the intention of the donor of the power? — What is the construction of the will of Sarah Davies? Irrespectively of the Wills Act, a power to be exercised by the survivor of several could not be exercised before the survivorship took place: *MacAdam v. Logan*, (b) *Hole v. Escott*; (c) and when the donor of the power has given over the estate, subject only to the power, an appointment must be shown to have been made by a person filling at the time the character described by the donor. The intention of the donor of the power here was that the survivor of her three named children should, when actually the survivor, have the advantage of exercising it, but that in default of such exercise by him or her as the case might be, the estate should go over. Admitting it to be true that a general power is equivalent to ownership, still what the testatrix has given by way of power and not by way of property must

(a) Page 475. (b) 3 Bro. C. C. 310. (c) 4 Myl. & Cr. 187.

* 67 be taken with all * the qualifications which she has by that mode of limitation imposed. In *Doe v. Tomkinson*, (a) a testator devised all his real and personal estate wheresoever and whatsoever equally to his sisters Mary and Elizabeth or to the survivor of them, and to be disposed of by the survivor as she might by will devise ; and it was held, that even assuming the sisters to be by virtue of such devise tenants in common for life with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, it was not such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, and that the power was not well executed by such will. Lord ELLENBOROUGH in giving judgment says, " It is said that this is a contingent remainder to the survivor and such as is devisable ; but, supposing it to be a contingent remainder, I think it cannot be considered as devisable, because the person who is to take it is not in any degree ascertainable before the contingency happens ; it cannot be said in whom the interest is during the lives of the two sisters, nor consequently that it is in either of them during that period ; and it is only in the event of survivorship that it becomes certain. Admitting therefore the enlarged construction put on the Statute of Wills by Lord KENYON and the other Judges in *Roe v. Jones*, (b) how can a person be said to have a contingent interest, when it is uncertain whether he is the person who will be entitled to have it or not ? And as to the case cited from *Viner* (c) to show that if this be a power to the survivor it has been well executed, the distinction between that case and the * 68 present is, that there the power was given * to a designated person to be executed upon a contingency ; here it is given to a contingent person." And this has been the prevailing view of the profession, Lord ST. LEONARDS laying down upon the authority of this case, and in the very words of Lord ELLENBOROUGH, and without any expression of dissent, that " there is a distinction where the power is given to a designated person to be executed upon a contingency, and a power given to a contingent person, if we may use the expression." Sugden on Powers. (d)

(a) 2 Mau. & Selw. 165.

(b) 3 T. R. 88 ; S. C., 1 H. Bl. 30.

(c) *Sclater v. Travell*, 3 Vin. Abr. 427, pl. 8 ; S. C. *nom.* *The Countess of Sutherland v. Northmore*, 1 Dick. 56 ; Sugd. Powers, 262 (8th ed.).

(d) Page 269 (8th ed.).

[*Mr. Lee (amicus Curiae)* referred to *Goodright v. Forrester. (a)*]

Secondly, we contend that a married woman's testamentary capacity was not enlarged by the Wills Act. That is the effect of the 8th section, which provides that "no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of the Act." In *Bernard v. Minshull, (b)* Vice-Chancellor Wood says, "I apprehend the Act meant simply this: the capacity of a married woman to execute a testamentary instrument shall be regulated by those rules which existed before the passing of the Act. Before the passing of the Act she was competent to dispose of property over which she had a power of appointment exercisable during coverture. Her capacity in that respect shall remain unaltered; but the provisions of the Act as to the mode in which a power shall be exercised by will, and all other the provisions of the Act as to the mode in which a power shall be exercised by will, and all other the provisions of the Act, will apply to any testamentary instrument which a * married woman would have been * 69 competent to execute prior to the passing of the Act just as it would apply to any testamentary instrument executed by any person *sui juris*. The legislature says, 'We will not enlarge your disposing power, but that power shall be exercised and shall be construed and operated upon in the manner here provided.'" If this power is not property nothing passes by the donee's will; and if it is property, it is property acquired after the date of the will and did not pass. For no will of a married woman is valid except such a will as might have been made before the passing of the Act, and such a will as this before the passing of the Act would neither have been a valid execution of the power, *Doe v. Tomkinson, (c)* nor a valid disposition of after-acquired property, *Bernard v. Minshull. (d)* The will is brought down to the death by the effect of the 24th section of the statute for the purposes of construction and for those only, and the 8th section silences the Act as to married women.

But even if the case could otherwise fall within the 24th and 27th sections of the Wills Act there appears upon the face of this

(a) 8 East, 552; 1 Taunt. 578.

(c) 2 Mau. & Sel. 165.

(b) John. 276, 297.

(d) Johns. 276.

will an intention contrary to that of speaking immediately before the death of Margaretta Nicholl, and to that of the will being an execution of this power. For, with regard to one estate, that in the parish of Llangeler, the testatrix, as having survived her brother John, exercises the power of appointment given to the survivor of the two by the will of Sarah Davies. But in the case of the property here in question, and with respect to which she does not in terms affect to exercise the power given to the survi-

vivor of herself and her two brothers, the gift to D. T. Bowen
 * 70 Davies shows that the * testatrix contemplates his surviving her, and yet she can only execute the power as his survivor. It may be said that unless these estates were included, there was nothing to pass under the general devise, because the realty subject to her marriage settlement was specially excepted. But in this will the testatrix has disposed of other estates, and as they might lapse it might well have been intended by the general devise to sweep in such windfalls as those, and not to execute the power. There is no intestacy here if the power is not exercised, as the estates are given over in default of appointment. Nor can it be predicated that she had received her husband's authority to execute the power during the marriage at a time when she was not actually the survivor of the donees.

They also referred to Sugden on Powers, (a) Real Property Commissioners' Report, Hayes and Jarman's Concise Forms of Wills, ed. by Badger, (b) *Stillman v. Weedon*, (c) Wills Act §§ 3, 7; *Price v. Barker*, (d) *Trimmell v. Fell*. (e)

The Solicitor-General (Sir R. PALMER), *Mr. Giffard*, and *Mr. W. Pearson*, for the persons claiming under the will of Margaretta Nicholl, on the assumption that the power had been well executed.

The cases of *MacAdam v. Logan* (g) and *Hole v. Escott*, (h) cited on the other side, were both cases of special powers, namely, powers of appointment amongst children; and that the doctrine con-

* 71 tained even in those * cases has been considered extreme may be seen from the terms in which Lord ST. LEONARDS speaks of

(a) Pages 124, 168, and note (8th ed.).

(b) Page 78.

(e) 16 Beav. 537.

(c) 16 Sim. 26.

(g) 3 Bro. C. C. 310.

(d) 16 Sim. 198.

(h) 4 Myl. & Cr. 187.

the former case: "Lord THURLOW," says this learned writer, speaking of a power to be executed by the survivor of two persons, "has even decided that such a power cannot be executed by the two persons during their joint lives." Sugden on Powers. (a) But, in the present case, the power is general, as it was also in *Doe v. Tomkinson*, which, indeed, is absolutely the only authority in favour of the appellants' contention. But in that case the conclusion arrived at was supportable upon independent grounds. The decision of the question, whether a fee-simple given as a contingent remainder to the survivor of two sisters was devisable by the will, made during the joint lives, of that one who eventually proved the survivor, — a question which, in the then state of the law, the Court answered in the negative, — was unnecessary, and the grounds for that decision, which are attributed to Lord ELLENBOROUGH, are unsatisfactory. They would equally apply to executory interests of every description, inasmuch as it is the uncertainty who will become entitled which renders the interest contingent. Probably, it was the decision in *Doe v. Tomkinson* which gave rise to, as it is exactly met by, the provision in the general enabling clause of the new Wills Act, whereby power is given to every person to devise, bequeathe, or dispose of "all contingent or executory or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested." Of this opinion is Lord ST. LEONARDS, who, in his work on Powers, says, in the passage immediately following that to which we have referred, "But it seems that under the 1 Vict. c. 26, * a general power by will to the survivor of two * 72 persons may be executed at any time by the will of the actual survivor;" clearly showing that in the opinion of Lord ST. LEONARDS the difficulty is removed by the statute.

The real question is as to the effect of the 8th section of the Wills Act. The Vice-Chancellor said, that the 8th section was intended to apply to the personal capacity of a married woman to make a will. The words "by a married woman" merely show that the Act was not meant to remove the disability of coverture. They were not intended to provide that none of the subsequent clauses of the Act should apply to a married woman's will. If

the will is valid as the will of a married woman, there is nothing in the Act to say that the dispositions contained in it shall not be interpreted and take effect in the same way as those in the will of a man. The Vice-Chancellor held, in *Bernard v. Minshull*, (a) as to the 27th section, and expressed an opinion as to the 10th and other sections of the Wills Act, that they applied to married women having testamentary powers of appointment exercisable during coverture, equally with persons *sui juris*. The capacity to make a will is one thing; the effect of the will when made is another. It was not the intention of the legislature to prohibit in the case of married women what was allowed to other persons. The first part of the 10th section is peremptory, and applies to all cases and especially to the execution of testamentary appointments. The 8th section does not take a married woman out of it. The 18th, 19th, 20th and 21st sections of the Act, which introduce the 23d, are of so general a character, that they must have been * 73 intended to apply to wills of married * women amongst others. If a power of appointment had been formerly given to a married woman, and there had been in default of appointment a gift to her absolutely on the determination of coverture, her will made during coverture would not, under the old law, without republication, have affected the property which had then become her own in her new capacity of a widow. That, we submit, would not be so now, notwithstanding the 8th section of the Wills Act, which only applies to the disability of married women, as such.

With regard to the intention which, it is said, this will shows, that the operation of the 24th and 27th sections of the Act was intended to be excluded, from the fact of there being a limitation in favour of David Thomas Bowen Davies in default of appointment; the argument resembles that which was unsuccessfully urged in *Withy v. Mangles*, (b) and *Bullock v. Downes*. (c) In the former of these cases, a wife's portion was settled in trust for her for life, with remainder to her husband for life, with remainder to the children of the marriage, to be vested at twenty-one or marriage; and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue as she should appoint, and in default of appointment for her next of kin:

(a) Johns. 276.

(b) 10 Cl. & Fin. 215.

(c) 9 H. L. Cas. 1.

but the child of the marriage was held not to be excluded from taking under the ultimate limitation. In *Bullock v. Downes*, (a) a life-interest in the whole of certain residuary funds was given by a will to a son, who was notwithstanding held entitled to participate, as one of the testator's next of kin, under an ultimate trust of the same funds for such person or persons of the blood of the testator as would, by virtue of the statutes of distributions of intestates' effects, have become and *been then entitled *74 thereto in case the testator had died intestate.

So, also, it is quite settled since the cases of *Chester v. Chester*, (b) *Attorney-General v. Vigor*, (c) *Church v. Mundy*, (d) and others of that class, that the rule of construction with reference to the effect of general words in a will upon rents and profits not disposed of, or reversions unlikely to fall into possession, is that which takes the words to comprehend a subject which falls within their usual sense, unless there is something like declaration plain to the contrary. The undisposed-of interest passes, and no objection arises from the fact, that the limitations contained in the will of the property passing under general words are for the benefit of, amongst other persons, persons beneficially interested in the property specifically given. One of the arguments in such cases against the conclusions which they have established has been that such conclusions must have been a surprise to the testators, who could not have anticipated them. But, here, it is clear that Margaretta Nicholl was not ignorant as to what would be the effect of the 27th section of the Wills Act upon her will, as she pointedly excepts from the operation of that section the property subject to her marriage settlement. Even if it were not so, the authority of the Vice-Chancellor Wood, in *Eccles v. Cheyne*, (e) itself a case of a general power of appointment vested in a married woman, is in our favour. "Looking," he says, "to the whole scope of the Wills Act, it appears to me to be clear, that the legislature intended to put an appointment by will in exercise of a general power upon precisely the same footing as a devise or bequest by a party having an absolute interest. *The 27th section enables *75 parties having an absolute power of appointment over property to deal with that property by will as their own absolutely,

(a) 9 H. L. Cas. 1.

(d) 15 Ves. 396.

(b) 3 P. Wms. 56.

(e) 2 K. & J. 676, 682.

(c) 8 Ves. 256.

and to dispose of it by will without reference to their power. If the words they have used to describe the property are sufficient to include it, the devise or bequest is to be construed so as to include such property." And in *Bernard v. Minshull*, (a) where the testatrix clearly intended her husband, whom she made in the first instance the object of her testamentary appointment, to be merely a trustee of the fund thereby appointed to him, the fund was nevertheless held, upon the failure of the trust for indefiniteness, to pass to him free from any trust, there being a subsequent residuary bequest to him in the will of all and singular other the property and estate of the testatrix.

They also referred to *Cofield v. Pollard*, (b) and called attention to the fact that in *Price v. Parker*, (c) no question arose affecting powers vested in a married woman; and also to the practice of conveyances, of only requiring the wills of married women, in whom testamentary powers are vested, to be executed with the formalities required by the Wills Act.

Mr. Freeling and *Mr. Waller*, for formal parties, took no part in the argument.

Mr. Hobhouse, in reply, cited on the first point *The Countess of Sutherland v. Northmore*, (d) and on the second, *Doe v. Bartle*. (e)

Judgment reserved.

December 10.

* 76 *THE LORD CHANCELLOR.—The question in this case arises under the following circumstances:—

By the will of Sarah Davies executed in the year 1825, freehold estates were appointed to trustees to hold subject to certain prior interests to the use of such persons and for such estates, intents, and purposes, manner and form as the survivor of the testatrix's three children, David, John, and Margaretta, should by deed, instrument in writing or will direct or appoint. Under this will the

(a) Johns. 276.

(d) 1 Dick. 56; Sugd. p. 262 (8th ed.).

(b) 5 W. R. 774.

(e) 5 B. & Ald. 492.

(c) 16 Sim. 198.

legal estate in fee was vested in the trustees, and a power therefore was a right to declare a trust and thereby to dispose of the equitable ownership. In the year 1838 John, one of the three children, was dead, but David and Margaretta, who had married a Mr. Nicholl, were living. By the marriage settlement of Mrs. Nicholl her husband covenanted with the trustees that he would permit the will of his wife to be proved in the proper Ecclesiastical Court, and that it should be lawful for her to exercise any power of appointment that might accrue to her during her coverture. In the month of August, 1838, Margaretta, being still under coverture, made her will, and thereby, after certain specific devises of other estates, she made a general devise and bequest of all her real and personal property for the benefit of her own children, if she should have any, and if she had no child who should survive her, then to her brother David for life, with remainder to his children, and in default of children unto the two natural children of her brother John. David died in the year 1848, leaving Margaretta the survivor. There was no republication of the will of Margaretta after the death of David. Margaretta died in the year 1858. The question arises between the plaintiffs who claim under the limitations contained in the will of Sarah Davies, in default of the execution of *the power of appointment given to the sur- * 77
vivor of the three children, and the respondents who claim under the will of Margaretta Nicholl.

The argument of the plaintiffs is, first that at the date of the will of Margaretta in 1838 the power of appointment, given to the survivor of the three children, had not arisen, and could not be exercised; and secondly, that the will is not within the operation of the present Statute of Wills, and cannot be made a valid appointment by force of the provisions of the statute.

As to the first question, the power of appointment was a general power that might be used for the benefit of the persons entitled to exercise it. It was therefore equivalent to ownership; in fact it was a right of exercising ownership, that would certainly belong to one of the three designated persons, but was uncertain as to the individual in whom it might become vested. There was a possibility of absolute ownership of the power in each one of the three children from the time of the death of the testatrix. To assert, that the right to exercise such a power does not arise until the person of the donee be ascertained, is simply to beg the question

at issue, and to affirm a conclusion, with regard to a contingent right to a power, which is wholly untrue with respect to a contingent right to an equitable estate. I think that a power to the survivor of three persons to declare a trust for his own benefit is not to be distinguished in principle from a trust for the benefit of the survivor. The one is a contingent interest, the other a contingent power. But if in equity as the law stood, even before the statute 8 & 9 Vict. c. 106, a contingent interest was alienable by deed or will, what is there to prevent a person who has a contingent right to appoint an estate for his own benefit from exercising that

* 78 power subject to the contingency? * And what is there in principle to prevent the instrument so executed from becoming a valid execution of the power as soon as the contingency happens? I speak of general powers only and such as affect equitable estates. At common law the principle which made contingent remainders inalienable might well extend to prohibit the exercise of a contingent power over the legal ownership. But in equity this rule never prevailed, and if a right to declare a trust for his own benefit be given to the survivor of two persons, it would seem that either might, before the contingency is ascertained, exercise this possible right, subject to the contingency, and that the appointment of the person who proved to be the survivor would take effect as soon as the contingency was determined.

With respect to authority upon this subject there is very little to be found. There are cases which decide that powers which are given for the benefit of special objects, and are therefore in the nature of a trust, or are given to trustees to be used as sound discretion may dictate at a particular period, must not be exercised by anticipation. But cases of this nature are wholly inapplicable to the present, because they proceed upon an obligation of duty, which does not apply to the exercise of an absolute right of ownership. Cases where the time for the exercise of the power is expressly defined are also inapplicable.

The decision of Lord THURLOW in the case of *MacAdam v. Logan*, (a) and other cases of the same description, is not disputed, and the *dictum* attributed to Lord ELLENBOROUGH in *Doe v. Tomkinson*, (b) may be admitted to be correct, if it be considered

* 79 with reference to the then * existing state of the law and confined to a power of appointing an use and not a trust.

(a) 3 Bro. C. C. 310.

(b) 2 Mau. & Selw. 165.

In the last edition of Lord St. LEONARDS'S work on Powers, published in 1861, there is found (a) the following passage: "It seems that under the 1 Vict. c. 26, a general power by will to the survivor of two persons may be executed at any time by the will of the actual survivor. If this be so, it alters the previous law." But I do not find that the previous law is anywhere explained or stated, except by a passage in page 269, which is to this effect: "There is a distinction where the power is given to a designated person to be executed upon a contingency, and a power given to a contingent person, if we may use the expression;" and for this the case of *Doe v. Tomkinson* (b) is cited. At the same time it seems to have been assumed that as an use limited to the survivor of two persons could not, as the law formerly stood, be aliened until after the survivorship, so a power to declare an use given to the survivor of two persons could not be exercised except by the actual survivor.

If, therefore, it was necessary to decide the question in the present case, I should be of opinion, that a general power of appointment over an equitable estate given to the survivor of two persons, to be executed by deed or will, would be well exercised by a will made during the lives of both the persons by that individual who afterwards proved to be the survivor.

But in the present case, if the validity of such an appointment were conceded to the respondents, yet, as in the will of Mrs. Nicholl, the power is not referred to, and there is no specific gift of the property which is the * subject of it, the general devise * 80 made by that will would not be a good execution of the power without the aid of the Statute 1 Vict. c. 26 (the present Statute of Wills), and if the will be entitled to the benefit of that statute it may be a good execution of the power, even if the law be taken to be, that there cannot be a valid exercise of the power either at law or in equity, unless made after the contingency has happened by the person who is the survivor. The objection of the appellant is founded on the 8th section of the statute, and may be thus stated. The statute cannot be applied to render valid any devise contained in the will of a married woman, which would not have been valid before the Act. But the will of Margaretta Nicholl, if made before the statute, would not have been valid as an appointment of the estate in question. Therefore, say the appellants, the Court cannot apply to this will the beneficial principles and rules of construc-

(a) Page 124.

(b) 2 Mau. & Sel. 165.

tion which are introduced by the 24th and 27th sections of the Act, and which are necessary to render the will a valid appointment.

In other words the plaintiffs contend, that the application to this will of the 24th section of the statute, thereby giving a subsequent date to the will, is to confer a testamentary capacity which would not otherwise exist, and that this is forbidden by the 8th section. They insist, that by applying the statute you make the will of a *feme covert* include that which, but for the statute, it would not; you enlarge her capacity, and make her will valid as to property of which, without the statute, it would not be a valid disposition.

It is obvious, that the result of this reasoning would exclude all wills of married women from the benefit of the provisions of the Act, wherever by virtue of its enactment such wills would
* 81 receive a more extended operation. * Such could hardly have been the intention of the legislature.

We may, perhaps, ascertain the meaning of the 8th section by adverting to the state of the law at the time of the introduction of the Act, and observing the manner in which the Act is constructed. By the law as it stood at the time when the Act was passed, an infant might make a valid will of personal estate, but a married woman had no testamentary capacity, except by virtue of a delegated authority. By means of a power or under a trust, as in the case of separate estate, a married woman might by a writing in the nature of a will dispose of real or personal estate, and with the license and consent of her husband, she might make a will properly so called of personal property. It was the intention of the legislature by the new statute to render infants absolutely incapable of making a will; but it has, I think, preserved the testamentary *status* of married women exactly as it stood under the existing law. Therefore a married woman's devise of real estate must still be made by means of a trust or power created for the purpose, and her capacity to bequeath the personal estate must still be derived from the license and authority of her husband. A distinction exists between the testamentary power of a *feme covert* and the effect and operation of her testamentary appointment. No greater testamentary power is to be obtained from the Act than would otherwise have existed. But an effect and operation may be given under the statute to a testamentary instrument executed by a married woman which may make that instrument a valid exer-

cise of an existing testamentary power, which before the statute it would not have been held to be. To render, however, the will of Margaretta, made in 1838, a valid appointment by way of devise of the estates in question under the statute, it is still necessary that * Margaretta should have had at the time of her * 82 decease full power and right to make such a testamentary appointment without the aid of the statute. This she undoubtedly had, and her will by being made to speak at the time of her death still depends for its operation on the extent of her then existing testamentary authority.

It seems to me, therefore, that the meaning of the 8th section may be correctly given by this paraphrase: No married woman shall acquire under this Statute any greater testamentary right or power than married women are now capable of possessing by the existing law. In short, the legal testamentary *status* of a *feme covert* is to remain the same. And this is confirmed by observing the manner of the construction of the Act. First, the word "will" is made to include appointments by will or by writing in the nature of a will in exercise of a power. And next, the 3d section is so worded as to give the most extensive testamentary power to every person, which words would include infants and married women, and render them as competent as any other persons, but for the effect of the 7th and 8th sections. By the 7th section, the infant is absolutely disqualified. By the 8th section, the legal position of the *feme covert* is to remain as before. Personally she acquires no enlarged capacity from the statute, although her testamentary instrument or will when made may have the benefit of more liberal rules of interpretation. But the appointment and the will are still to be confined within the limits of the authority of the maker existing at the time of the death. It is not, however, necessary, that the authority should exist at the time of the execution of the instrument, if it be afterwards acquired and be subsisting at the time of the death of the testatrix.

Such appears to me to be the meaning of the language * of the Act, and to have been the intention and policy of the * 83 law. Subject, therefore, to the objection which remains to be considered, I have no difficulty in holding, that by virtue of the 24th section, the will of Margaretta is to be read and applied as if it had been executed immediately before her decease, and that under the 27th section, the general devise contained in the will, so

being considered to have been re-executed, is a good execution of the power of appointment given to the survivor.

But it is said that an intention contrary to each of these conclusions appears by the will, and, therefore, that neither section is applicable. The sign of this intention is said to be the fact, that David, the brother, takes an estate for life under the general devise. But how can that fact, or the subsequent death of David, be taken to prohibit the will from speaking at the time of the death of the testatrix? Might it not have been simply re-executed after the death of David? And would the devise to David, which had lapsed by his death, have interfered with the operation of the testamentary instrument when so re-executed? There is nothing to prevent the will from taking effect at the death, and being considered as if it had then been again executed. We must, therefore, take the general devise contained in the will, as if it had been re-executed after the death of David; and if this be so, is there any thing to prevent the will from operating as if the appointment to David had never been contained in it? To prevent the application of the 24th section, an intention must be shown excluding the effect given to the will by the statute, namely, the effect of a continuing operation during the subsequent life of the testatrix; and to exclude the operation of the 27th section you must take the will as having been executed immediately before the death, and

* 84 show on the face of it an intention sufficient to deprive * the general devise of the effect given to it by the statute, namely, that of being a valid execution of any general power of appointment, which at the time of his decease might have been exercised by the testator. The statute must apply unless the conclusions of the 24th and 27th sections are on the face of the will clearly repelled.

I must, therefore, affirm the decree of the Vice-Chancellor, and, as a necessary consequence, I must dismiss this petition of rehearing with costs.

In the Matter of WALTER BLACKMORE, a Person of Unsound Mind.

1862. December 19. Before the LORDS JUSTICES.

An application of a lunatic for a *supersedeas* of the commission of lunacy, on the ground of his recovery, will not be at once granted on evidence of the lunatic no longer exhibiting unsoundness of mind, but will be ordered to stand over until it can be seen what will be the effect of removing the restraint imposed by the existence of the commission.

THIS was the petition of a person who had been found lunatic under a commission of lunacy for a *supersedeas* of the commission, on the ground that he had completely recovered.

Mr. W. M. James and *Mr. Sheffield* supported the petition.

Mr. Fischer, for the committee of the person, opposed it, citing *Ex parte Holyland*, (a) *In re Dyce Sombre*. (b)

There was a conflict of evidence, and the Lords *Justices * 85 having themselves had personal interviews with Mr. Blackmore, reserved their judgments, which they now delivered as follows:—

December 19.

THE LORD JUSTICE TURNER. — This is an application, on the part of Mr. Blackmore to supersede the commission of lunacy issued against him. It has been truly observed by Lord ELDON, that there is no more painful duty imposed upon those, who are intrusted with the jurisdiction in lunacy, than that of determining the question, whether the persons who have become subject to the jurisdiction have so completely recovered, as that the commission issued against them ought to be superseded; and certainly this case has, so far as I am concerned, illustrated Lord ELDON's observation, for it has given me much anxiety. It may well be in all these cases that the recovery is apparently perfect, whilst the restraint of the commission continues, but that the removal of that restraint may be followed by

(a) 11 Ves. 10.

(b) 1 Mac. & G. 116.

a recurrence of the disease. It is therefore, as I apprehend, the duty of those who are intrusted with this jurisdiction to be careful, when applied to for a *supersedeas*, to ascertain, as far as it can be ascertained, not merely, as was contended in this case on the part of Mr. Blackmore, that there is recovery whilst the restraint of the commission continues, but that the recovery will be continuous when that restraint is removed. It is obvious, indeed, that, unless this precaution is taken, there would in every case of intermittent lunacy be a continued succession of orders for issuing and superseding commissions. Although, therefore, I place implicit confidence in the medical reports which we have had in this case, and from the personal interviews which we have had with Mr. Blackmore see no reason to doubt the soundness of his mind

* 86 whilst under the restraint of the * commission, I nevertheless think that we ought not at present to go so far as to supersede the commission, but that, before we venture to do so, it is our duty to see, so far as it can be seen, what will be the effect of removing the restraint which the existence of the commission has imposed; to see whether the removal of that restraint will or will not be attended with a recurrence of the disease. That this is the course which we ought to adopt in this case seems to me to be borne out no less by reason than by authority. It appears from cases, of which some are reported and the others have been furnished to us by Mr. Wilde from the records in lunacy, that this was the course adopted by Lord KING in *Lord Ferrers's Case* in 1730; (a) by Lord HARDWICKE in *Sir William Rooke's Case* and *Okeover's Case* in 1737 and 1745; by Lord THURLOW in *Errington's Case*, the final order in which was made by Lord LOUGHBOROUGH in 1798; by Lord ELDON in *Stocks's Case* and *Paine's Case* in 1813 and 1822; and in effect by Lord LYNTHURST and Lord COTTENHAM in *Dyce Sombre's Case* in 1844 and 1847; and I think therefore, that what ought now to be done on this petition is, not to supersede the commission, but to make an order in terms similar to that pronounced by Lord ELDON *In the Matter of Stocks*, viz.: "Now, upon considering the circumstances of this case, we think fit and hereby order that the proceedings under the commission of lunacy in this matter be suspended until further order, and that the said Walter Blackmore be at liberty to apply to us or to the Lord

(a) *Ex parte Ferrars*, Mos. 332.

Chancellor for further relief upon this petition in Trinity Term next, and that in the mean time the said Walter Blackmore do have the management and control of his business and estate without the interference or control of the committee of his person and estate, and that in *the mean time also any of * 87 the persons interested be at liberty to apply to us or to the Lord Chancellor as they may be advised."

THE LORD JUSTICE KNIGHT BRUCE.—After much reflection, my conclusion is the same.

1863. June 5.

Upon an application now made accordingly by Walter Blackmore the commission was superseded.

GLEAVES v. PAINE.

1863. January 15. Before the Lord Chancellor Lord WESTBURY.

A husband and wife mortgaged in fee land of which they were seised in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt, and in the suit by the wife for a settlement of the equity of redemption on her and her children, and for redemption as against the mortgagee and for foreclosure against the assignees and the husband, the assignees disclaimed. *Held*, that the wife was entitled to redeem as against the mortgagee, and to have the whole fee settled upon herself and her children, the husband not objecting.

Form of decree in such a case.

Sturgis v. Champneys (5 Myl. & Cr. 97) not to be extended.

THIS was an appeal from a decree of the Master of the Rolls, directing a settlement of an equity of redemption upon the plaintiff Ann Gleaves, the wife of the defendant William Gleaves.

The bill, to which William Paine and Joseph Lenton the husband's assignees, Thomas Pyke the mortgagee * and the * 88 husband were defendants, stated, in substance, as follows :—

By an indenture, dated the 25th of September, 1857, made between William Gleaves and Ann his wife of the one part and Thomas Pyke of the other part, duly acknowledged by Ann Gleaves,

the land in question in the cause, of which William and Ann Gleaves were seised in fee-simple in right of Ann, was, in consideration of 700*l.* advanced to the husband, assured to the use of Thomas Pyke, his heirs and assigns, subject to a proviso, that on payment by William Gleaves, his heirs, executors or administrators, or the person or persons beneficially entitled to the equity of redemption of the mortgaged premises, to Thomas Pyke, his executors, administrators, or assigns, of the sum of 700*l.*, with interest, at the time therein mentioned, Thomas Pyke, his heirs or assigns, would, at the request and costs of William Gleaves, his heirs or assigns, reassure the premises free from encumbrances to the use of Ann Gleaves, her heirs and assigns; and the deed contained a covenant by William Gleaves for payment of the mortgage-money and interest. Default was made in payment on the day named in the deed, and afterwards, on the 25th of February, 1862, William Gleaves was adjudicated bankrupt. The defendants William Paine and Joseph Lenton were his assignees.

There were issue of the marriage seven children, who were all living; and no settlement or agreement for a settlement of any property whatsoever had been made upon or since the marriage; but William Gleaves had since the marriage received other property in right of his wife, to a considerable amount. The bill stated that the whole of the 700*l.* was received by William Gleaves, and applied by him to his own purposes; that the plaintiff had no property or means of support whatever for herself * 89 * and her children except the mortgaged property, and that the value of such property free from encumbrances was not more than 800*l.*

The bill further alleged, that the plaintiff concurred in the mortgage and in the conveyance of her property thereby made as a surety only, and charged that the estate in bankruptcy of her husband was primarily liable to pay the mortgage debt in exoneration of the plaintiff's property, and that she was entitled to have the mortgaged property, or the equity of redemption thereof, settled upon her, or a proper provision made out of the same for her maintenance and support.

There was a further allegation that the assignees refused to permit the mortgagee to prove against the bankrupt's estate for the moneys due upon the mortgage without the mortgagee first realizing or giving up for the benefit of the bankrupt's estate the

estate and interest of the bankrupt in the mortgaged property. There was also a charge that the estate and interest of the bankrupt in the mortgaged property ought to be settled for the plaintiff's benefit.

The prayer was for a declaration that the mortgage debt of 700*l.* and the interest thereof and all other moneys payable in respect of the same had been and were the debt of the bankrupt, and that the security effected by the mortgage upon the plaintiff's property was only a surety for such debt, and that the said property ought to be exonerated from such charge out of the bankrupt's estate other than his interest in the mortgaged property; and that such last-mentioned interest, or, at least, the equity of redemption thereof, ought to be settled for the benefit of the plaintiff. It also sought a direction that the mortgagee should prove under the bankruptcy for what was * due to him in * 90 respect of his mortgage; and might (if necessary for the purpose of such proof) give up and relinquish the estate and interest of the bankrupt in the mortgaged property, and might do all other necessary acts for the purpose of enabling himself to prove and recover a dividend against the bankrupt's estate, the plaintiff offering to indemnify the mortgagee against all loss or damage which might be thereby occasioned. It also sought a settlement upon the plaintiff of the mortgaged property, or the estate and interest therein, which the bankrupt acquired by his marriage with the plaintiff, or, at least, the equity of redemption of such property or of such estate therein, subject to the mortgage debt or to such part thereof as should not be discharged, out of the bankrupt's estate. It also sought liberty (if necessary) for the plaintiff to redeem the mortgage, and for a reconveyance in that case of the mortgaged property to her or for her separate use on payment of so much of the mortgage debt as the dividends in respect thereof to be received from the bankrupt's estate should not suffice to pay, or otherwise, upon payment of the whole of the mortgage debt, with such rights and remedies over against the bankrupt's estate as the Court might think fit to direct.

The cause came on for hearing before his Honor the Master of the Rolls on the 7th of August, 1862, on motion for decree, when it was ordered that the next friend of the plaintiff should pay to the assignees their costs of suit, and that the estate and interests of the bankrupt in the mortgaged premises should be settled upon

trusts for the plaintiff, for her separate use, during her life, with remainder to her children as she should appoint, and in default of appointment equally; and in case the plaintiff should die without leaving any child, in trust for the plaintiff and her heirs absolutely.

* 91 * The assignees appealed from the whole decree.

Mr. Cole and Mr. Kay, for the respondent, the plaintiff below. — The decree of the Master of the Rolls is in accordance with the authorities, which extend to the case of estates in land: *Sturgis v. Champneys*, (a) *Hanson v. Keating*; (b) and the equity which it recognizes is one which can be enforced by the wife as plaintiff: *Lady Elibank v. Montolieu*, (c) *Wortham v. Pemberton*. (d) Besides which, the cases of *The Earl of Kinnoul v. Money*, (e) and *Aguilar v. Aguilar*, (g) show that in such a case as this the relation of the husband and wife is that of principal and surety for the husband's debt, and that the estate of the husband must be first applied in exoneration of that of the wife. The assignees are not entitled to require the mortgagor to give up his security before he proves his debt in bankruptcy. It is, on the contrary, incumbent on him to recover what he can from the bankrupt's estate, before he resorts to the property of the wife. *Ex parte Hedderly*. (h)

Mr. Selwyn and Mr. E. F. Smith, for the appellants. — A wife as against her husband's assignee for value, who becomes so at a time when the husband is able and willing to fulfil his moral obligation of maintaining her, has no equity to a settlement out of her husband's interest in her estate in lands. *Hill v. Edmonds*, (i) *Tidd v. Lister*, (k) *Durham v. Crackles*. (l) In * 92 the * present case the husband's interest in his wife's estate is an interest for life by the curtesy; but had there been no issue, he would still have taken a freehold interest during the joint lives of himself and his wife. *Robertson v. Norris*. (m) That interest would have passed by the mortgage deed, even if it

(a) 5 Myl. & Cr. 97.

(b) 4 Hare, 1.

(c) 5 Ves. 737.

(d) 1 De G. & Sm. 644.

(e) 3 Swanst. 202, n.

(g) 5 Madd. 414.

(h) 2 Mont., D. & De G. 487.

(i) 5 De G. & Sm. 603.

(k) 3 De G., M. & G. 857.

(l) 32 L. J. (N. S.) Ch. 111.

(m) 11 Q. B. (N. S.) 916.

had not been executed and acknowledged by the wife: *Robertson v. Norris*; (a) and the execution of such deed by him would, so far as it affected his own interest in the property, have been simply the exercise of a legal right, not conferring on the wife any equity to a settlement: *Warden v. Jones*. (b) We do not however desire to redeem, as the life-interest of the bankrupt would be worth less than the amount of the mortgage money. With regard to the mortgagee's right to prove without giving up his security, or having the value of it ascertained by a sale, the Court of Bankruptcy has indeed a discretion to relax its ordinary rule and to order a valuation, but it is a discretion which should be exercised with great caution and only under special circumstances. *Ex parte Smith*. (c) The mortgage ought to be realized.

Mr. John Rigby, for the husband and the mortgagee.

Mr. Cole, in reply. — No relief is sought by the bill against the mortgagee, and therefore the cases cited against us, and which are cases of a particular assignee, as opposed to assignees in bankruptcy or insolvency, do not apply.

[The Lord Chancellor during the arguments observed that in *Sturgis v. Champneys* a new law was introduced by Lord COTTENHAM. That, according to the previously *existing *93 law, where the assignees of the husband came to this Court for the purpose of obtaining the property of the wife, the Court had taken upon itself to say that they should not recover such property without making a reasonable provision for the performance of the moral obligation of the husband to maintain the wife. That *Lady Elibank's Case* had gone to this further extent, that where it was perfectly clear that the subject-matter in controversy must be determined and decided upon and distributed in this Court, there the wife might come to assert the equity, and need not wait until the defendant came to the Court to seek its interference. But that here the higher inquiry still remained, whether a Court of Equity was not bound with respect to land to follow the law, or whether it was at liberty to set up its own peculiar rule in order to defeat that which, but for the legal estate being outstanding, would

(a) 11 Q. B. (N. S.) 916.

(c) 2 Rose, 63; 1 V. & B. 518.

(b) 2 De G. & Jo. 76.

be a pure legal title. His Lordship intimated, that had not the case of *Sturgis v. Champneys* been decided so long ago he should not have been disposed to follow it. That the learned Judge, however, who decided it had put his decision on the ground that there was no reason why the Court should not fasten upon the assignee of the husband when he was plaintiff in respect of an estate in land the same obligation which the Court had been in the habit of fastening upon the assignee when he sued in respect of an equitable interest in personal property. That then in a subsequent case, (a) the Vice-Chancellor KNIGHT BRUCE thought that Lord COTTENHAM did not mean to limit the equity of the wife as to real estate to the particular case where the assignee of the husband was plaintiff, and had applied to the case of real estate the rule acted upon in the case of *Lady Elibank v. Montolieu*. That * 94 although the decision in **Sturgis v. Champneys*, being a decision of the Lord Chancellor, must be followed, having been established so long, his Lordship was not disposed to extend it any further than the actual decision] went, and that as in that case the assignees were plaintiffs, it would extend the rule very much to recognize the doctrine that a wife might come here asking a settlement of real estate belonging to the husband against the husband's assignee, which the assignee could render available without resorting to this Court.

At the conclusion of the arguments the Lord Chancellor said : —

It is a lamentable thing to observe how much of the litigation in this country and how much of the difficulty in the administration of justice are due to the fact that the jurisdiction is divided between different Courts and conducted upon different principles. We have in this case to refer to the jurisdiction of a Court of Law, which is one thing, to the jurisdiction of a Court of Equity, which is another thing, and finally to the jurisdiction of a Court of Bankruptcy, which is a third thing. The justice of a Court of Law is one thing, the justice of a Court of Equity is another, the justice of the Court of Bankruptcy is a third ; and it is from that confusion that this very simple case has become complicated.

The plaintiff in this case previous to her marriage was seised in

(a) *Wortham v. Pemberton*, 1 De G. & Sm. 644.

fee-simple of a freehold estate. Upon her marriage there was no settlement. The result, therefore, was, that the husband and wife became seised as tenants in fee-simple in right of the wife; and in that state of circumstances, by a deed duly acknowledged by the wife under the statute, the fee-simple was conveyed * to * 95 a mortgagee to secure a sum of money. The equity of redemption, which was given in the form of a trust for reconveyance on payment of the mortgage money, was limited to the wife, her heirs and assigns. The interest therefore of the husband and the wife, save only so far as it was bound by the mortgage, remained unaltered.

But after this mortgage, there occurred the bankruptcy of the husband, and the alienation made by law upon that bankruptcy has the same effect as if the husband had, by a proper deed of conveyance, conveyed his interest in the estate. Therefore, after the bankruptcy, the interests of the husband and wife became divided into the interest of the husband in the estate during his life (there being issue of the marriage), and the inheritance, which of course remained vested in the wife. The controversy which arises is as to the right of the wife and the proper course to be adopted under those circumstances.

The bill strangely confounds the various rights and interests of the wife. Partly it asserts her right of redemption, and partly it asserts her right to a settlement of the property. It is however admitted at the bar that the amount of the mortgage is much greater than the value of the life-interest of the husband, and that fact relieves the case of much of the difficulty which otherwise would have belonged to it.

The estate of the wife being mortgaged in the manner I have described for the debt of the husband, the wife unquestionably assumes in the eye of the Court of Equity the character of a surety for the husband. Properly speaking she is not a surety, but she is so called by analogy. She has a title to call upon the husband to * exonerate her estate from the debt. But the husband * 96 having become bankrupt, that exoneration, which has been so pressed upon me in argument, is nothing more than a right, after she has paid the debt, to go in as a creditor upon the husband's estate in bankruptcy, and there, together with his other creditors, to receive such dividend as she may be able in respect of this debt which she has so paid.

But if she desires to exercise the right of redemption I apprehend that she is entitled to a declaration of the existence of that right. The first right of redemption would belong to the assignees, because the first interest subject to the mortgage is the estate of the husband; but the assignees are not desirous of exercising that right, and I have therefore no difficulty in saying that I shall preface the decree which I am about to make with a declaration, that the assignees not desiring to exercise any right of redeeming the estate of the husband, the wife is entitled to redeem the mortgage now vested in the defendant Thomas Pyke.

But it is then contended, on behalf of the wife, that she is entitled to a settlement of the whole of the equity of redemption; in other words, to a settlement for her separate use and for the benefit of her children of that estate and interest which have passed to the assignees of her husband under his bankruptcy.

Had it not been for the circumstances to which I have already adverted, namely, that by abandoning all right of redeeming the mortgage, the assignees declare that estate and interest to be worthless, I should have thought it necessary to examine the decisions and the doctrine discussed at the bar, for the purpose of ascertaining whether I ought or ought not to declare the * 97 wife entitled, * as against an adverse party, to any such equity. As it is, I forbear to enter into such an examination, inasmuch as there is in reality nothing to decide. For it follows that, — the assignees, stating the equity of redemption to be worth nothing and therefore not claiming it, — if the wife chooses to exercise the right of redeeming the mortgage, she will be entitled, after having exercised such right, to foreclose the estate and interest of her husband; and, inasmuch as all the rest of the property is her own inheritance, she may if she pleases, with the assent of the husband, who would not, I take it for granted, object to such a decree, have an affirmance of that part of the decree of the Master of the Rolls which has at present directed a settlement of the estate. The decree, therefore, that I propose to make is this: [His Lordship then stated the terms of the decree, the material portions of which are set out below, and continued:] —

The decree which I have now pronounced will, in point of fact, be of little or no use to the wife, because the contest is about that which is worth nothing, namely, the estate of the husband *minus*

the mortgage, which it was palpable from the commencement could not have been worth a shilling. The whole litigation, therefore, has been a litigation productive of nothing except costs and expenses, an additional reason for regret that any such matter should have been brought into a Court of Equity. Every thing might have been done in bankruptcy without a suit and two hearings and an expenditure of money more than I should think is the value of the subject in controversy.

The following are the material portions of the decree :—

His Lordship doth order, that the said decree be reversed, except so far as the same directs payment by * the next * 98 friend of the plaintiff to the defendants William Paine and Joseph Lenton of their costs of this suit ; and the said defendants William Paine and Joseph Lenton by their counsel disclaiming all right to redeem the mortgaged premises in the pleadings of this cause mentioned, his Lordship doth declare that the plaintiff is entitled to redeem the said mortgaged premises. And it is ordered that an account be taken of what is due to the defendant Thomas Pyke for principal and interest on his mortgage in the pleadings mentioned and for his costs of this suit (to be taxed, &c.) ; and upon the plaintiff paying to the said defendant Thomas Pyke what shall be certified to be due to him for principal, interest and costs as aforesaid within six calendar months, &c., it is ordered that the defendant Thomas Pyke do reconvey the said mortgaged premises, &c., to the trustees to be appointed of the settlement hereinafter mentioned, &c. ; and upon the plaintiff redeeming the mortgaged premises as aforesaid, it is ordered that the same be settled (the defendant William Gleaves by his counsel consenting) upon the following trusts ; that is to say, upon trust for the plaintiff for her separate use during her life, with remainder to her children as she shall by deed duly executed or by her last will appoint, and in default of appointment in trust for her children equally ; and in case the plaintiff shall die without leaving any children, then in trust for the plaintiff and her heirs absolutely (such settlement or reconveyance to be approved by the Judge) ; but in default of the plaintiff redeeming the mortgaged premises as aforesaid, it is ordered that the plaintiff's bill be dismissed out

of this Court as against the defendant Thomas Pyke, with costs to be taxed, &c., and paid by the said Barford Pyke, the next friend of the plaintiff, to the said defendant Thomas Pyke," &c. Reg. Lib. 1868, A. 116.

1863. January 16. Before the Lord Chancellor Lord WESTBURY.

A testator sold to his daughter's husband a business, which the testator had purchased, for sums secured by promissory notes, payable five years after date. The testator also became security for the husband to a banking company. The husband became bankrupt, and the testator proved his debt under the bankruptcy. Afterwards he made his will, giving his property upon trusts for his children, but declaring that in case he should have made any advance of money to any of his children or to the husbands of his daughters, such child should not be entitled to receive any part or share of the testator's property until he, she, or they should have brought into hotchpot such sums of money as should have been so advanced, with interest. Before the promissory notes became due, but after the testator had been obliged to pay the debt to the banking company for which he was surety, *Held*, —

- 1st. That the amounts due on the promissory notes were not advances to be brought into hotchpot.
- 2d. That the money paid to the banking company was an advance,¹ and was not extinguished or deprived of that character by the bankruptcy, but must be brought into hotchpot.

THIS was an appeal from the decision of the Master of the Rolls upon a special case submitted to the Court to declare the construction of the will of Samuel Haines, dated the 19th of August, 1858, whereby the testator gave to Charles Henry Auster and Henry Stephen Hill the sum of 10,000*l.* upon trusts for the testator's wife during her widowhood and subject thereto, to be dealt with as part of his residuary personal estate. He then gave certain leaseholds to the trustees upon trusts to be dealt with as part of his residuary personal estate. He also gave to them certain freeholds upon trusts for his daughters Eliza Powell and Maria Warner Gillett as tenants in common for life, and their

¹ See *Boyd v. Boyd*, L. R. 4 Eq. 305.

respective children after their respective deaths, with remainders over; and then directed the freeholds to be valued, and the trustees to set apart out of his residuary realty and personalty a sum of money equal to half the amount of the valuation, and deal with the same for the benefit of his son Thomas William Haines and his children. The testator then devised and bequeathed all the residue of his personal estate, after payment thereof of his debts, funeral and testamentary expenses, to his trustees upon * trusts for the sale and conversion thereof; and * 100 directed the proceeds, and the mesne rents and profits, to be applied in the first place in setting aside a sum of money equal to half the amount of the valuation of the freeholds for the benefit of his said two daughters; and then in dividing the residue into three equal parts. And the testator declared that the trustees should stand possessed of the share of his freeholds which, under the limitations of his will, might vest in them, and of one-half of the amount of the valuation and one-third of the trust money, upon trusts for the benefit of his son Thomas William Haines, and, in certain events, of his daughters and their children; and of another third part of the trust money upon trusts for investment thereof and payment of the annual interest, dividends, and proceeds arising from the investment, to his daughter Eliza Powell for her life for her separate use, without power of anticipation, with remainders over. The trusts of the remaining third part of the trust money were in favour of Maria Warner Gillett, her children and others. And the will contained the following proviso: "And I do hereby declare that in case I shall have made or shall make any advance of money to any of my said children, or to the husbands of my said daughters which shall not have been repaid, or the interest of which (if reserved) shall not have been duly paid at the time of my decease, such child or children shall not be entitled to receive any part or share of my property until he, she, or they shall have accounted for and brought into hotchpot such sum or sums of money as shall have been so advanced as aforesaid and the interest thereof."

Samuel Haines died on the 8th of February, 1861, leaving surviving him his widow Mary Matilda Haines and his two daughters Eliza Powell, wife of Thomas * Powell, and * 101 Maria Warner Haines, afterwards the wife of William Gillett, and his son Thomas William Haines.

The will was proved on the 20th of April, 1861.

Thomas Powell and Eliza Haines were married on the 28th of August, 1856; but the latter did not receive any marriage portion from her father, who made neither to her nor to her husband any advance of money.

Previously to and at the time of the marriage Samuel Haines the younger, since deceased, a son of the testator, carried on the business of a brass founder at Birmingham, which business became the property of the testator. The testator endeavoured in various ways to sell and dispose of it, and ultimately proposed to and arranged with Thomas Powell for him to take to it, which the latter agreed to do at the sum of 1841*l.* 15*s.* 4*d.*, for which the testator took from Thomas Powell his two promissory notes, both dated the 7th of February, 1857, payable at five years after date, with interest at 5*l.* per cent, one of such notes being for 1600*l.* and the other for 241*l.* 15*s.* 4*d.*, and at the same time agreed to become responsible for Thomas Powell to the Birmingham Town and District Bank, who were Thomas Powell's bankers, for the sum of 800*l.*, and the testator accordingly gave his written guarantee for 500*l.*, part of that amount, and indorsed Thomas Powell's promissory note for the sum of 300*l.*, the balance, to the bank.

On the 5th of March, 1858, Thomas Powell was adjudged bankrupt on his own petition.

On the 8th of April, 1858, an order was made that a separate petition of John Powell, a partner of Thomas Powell in
*102 another business, and the separate petition of * Thomas

Powell should be consolidated with and form part of a joint petition which had been filed against John Powell and Thomas Powell. In support of an appeal against this order the testator made an affidavit, in which he deposed as follows: "The said Thomas Powell was and still is justly and truly indebted to me this deponent in the sum of 1841*l.* 15*s.* 4*d.*, being the price or consideration money agreed to be paid by the said Thomas Powell to me on the sale by me to the said Thomas Powell of the goodwill, stock in trade of and other effects in, about, and belonging to the trade or business of a brass founder, and also in the further sum of 98*l.* 7*s.* 7*d.* for interest upon the same at the rate of 5*l.* per cent per annum from the 7th day of February, 1857, to the filing of the said separate petition for adjudication in bankruptcy by him the said Thomas Powell, making together the sum of 1940*l.* 2*s.*

11*d.*, for which said sum of 1940*l.* 2*s.* 11*d.* or any part thereof I have not, nor hath or have any person or persons by my order or to my use to my knowledge or belief received any security or satisfaction whatsoever, save and except the promissory notes hereunto annexed, marked A, of which I am the holder, and which are in my possession " (meaning the two promissory notes of the 7th of February, 1857) ; " that I am also liable to the said Birmingham Town and District Banking Company on my guarantee for 500*l.*, dated the 30th day of January, 1857, and on a promissory note for 300*l.*, dated the 2d day of February, 1858, made by the said Thomas Powell and indorsed by me to the said company, making together the sum of 800*l.*, for money by the said company lent and advanced to, for or on account of, and paid, laid out and expended by the said company for the said Thomas Powell at my request, and which, as I am informed and believe, the said company have proved against the estate * of the said Thomas Powell * 103 under the said separate petition by him."

Ultimately, the testator proved his debt of 1940*l.* 2*s.* 11*d.* against Thomas Powell's separate estate under the bankruptcy, and received a dividend of 367*l.* 16*s.* 5*d.* The Birmingham Town and District Banking Company proved against Thomas Powell's separate estate for 1085*l.* 15*s.* 11*d.*, for 800*l.* of which the testator was responsible, and the latter under the terms of his guarantee would only be entitled to credit as between himself and the bank for the dividend on the 300*l.* His will was made after he had proved his debt under the bankruptcy, but before he received a dividend thereunder or paid any sum of money to the bank. He did not in his lifetime make any claim for principal or interest against Thomas Powell, and in his ledger the interest on the 1841*l.* 15*s.* 4*d.* was brought down to the date of the bankruptcy only.

For the purposes of the case, it was stated that it was to be taken that upon an accurate account of the transactions between Samuel Haines and the elder and his son-in-law Thomas Powell the former paid to the District Bank on the 16th of March, 1859, 367*l.* 16*s.* 5*d.* ; on the 23d of May, 1859, 200*l.* ; and on the 1st of October, 1859, 240*l.* 5*s.* 5*d.*, making together an aggregate of 808*l.* 1*s.* 10*d.* It was also stated, that the share of Eliza Powell and her children in the testator's residuary estate, including therein her share and interest in the 10,000*l.* directed by the will

to be raised for the benefit of the testator's widow, exceeded the amount of the claim; and that it was proposed, that in any event the costs of the special case should be paid out of the testator's residuary estate.

* 104 * The questions stated by this case for the opinion of the Court were the following:—

“1st. Is the said claim, amounting to the said sum of 2443*l.* 8*s.* 9*d.*, of the said testator against the said Thomas Powell, or any and what part thereof, to be considered as an ordinary debt and barred by the certificate in bankruptcy of the said Thomas Powell?— or

“2d. Is it, or any and what part thereof, an advance within the meaning of the said will?— and if so

“3d. Is it, or any and what part of it, to be accounted for as part of the share in which the said Eliza Powell is interested of the said testator's residuary personal estate?”

The case came on for argument on the 20th of November, 1862, before his Honor the Master of the Rolls, who by his order then made, declared that the said claim amounting to the said sum of 2443*l.* 8*s.* 9*d.* was not an advance within the meaning of the said will.

From this order and declaration the testator's remaining children, Thomas William Haines and Maria Warner Gillett, appealed.

Mr. Selwyn and *Mr. Karlake*, for the plaintiffs, the appellants.

Mr. De Gex, for the trustee.

Mr. Baggallay and *Mr. J. Sidney Smith*, for the defendants.

Mr. Selwyn, in reply.

* 105 * THE LORD CHANCELLOR.— If, under the contract between the testator and his son-in-law, the purchase-money had been presently payable or payable at any time which occurred during the testator's life, or if the promissory notes had become due during the testator's life, I should have had little difficulty in concluding that the amount of the purchase-money was an advance

of money made by the testator to his son-in-law within the meaning of the words of the will. But upon the statements in this case I must take the fact to have been that the business was sold by the testator to his son-in-law for the amount named, payable at the expiration of five years from and after the date of the contract. The contract was dated in the year 1857. The testator died in the year 1861; and consequently the purchase-money under that contract never became due and payable to the testator as a debt. It would be an absurdity to hold that money which the testator was never entitled to receive during his life can by any stretch of interpretation of these words be treated as an advance of money made by him to his son-in-law during his lifetime. I have no difficulty, therefore, in affirming the judgment of the Master of the Rolls, so far as relates to that item of the alleged advance which is now claimed to be retained.

The other portion of the case relates to money paid by the testator during his lifetime to the bank in satisfaction of the debt of his son-in-law. The bank had made advances to the son-in-law upon the joint security of himself and of the testator. The testator was required to pay and did pay three several sums amounting to 808*l.* 1*s.* 10*d.* to the bank in discharge of that debt. There can be no difficulty in holding that that was an advance of money within the meaning of the will. But *the Master of the Rolls seems to have thought that the *106 effect of the subsequent bankruptcy was to wipe out the debt, so as, in point of fact, to bring the transaction to what it would have been if the testator subsequently to the payment had absolutely released and discharged his son-in-law. I am not of that opinion. The testator's proof of the debt under the bankruptcy is not equivalent to such a release, nor is the receipt of the dividend by the testator under the bankruptcy to be taken as any thing more than a *pro tanto* payment of the money. Moneys advanced by the testator, which were not duly paid, remain advances of money within the meaning of this clause, and are therefore, liable to be retained and deducted out of the legacy to the daughter of the testator, to whose husband the advances were made.

I must therefore reverse the judgment in those particulars. In respect of the sums of money paid by the testator to the bank in discharge of the debt of his son-in-law, I think that they were

advances within the meaning of the will, and that the amount of them, *minus* a proportionate part of the dividends received from the son-in-law's estate, constitute the sum that ought to be retained out of the legacy given under the will to the wife of the son-in-law.

The proper answer to the first question will be, that so much of the 2443*l.* 8*s.* 9*d.* as consists of the payments which I have described are advances within the meaning of the clause in the will, *minus* only an apportioned amount of the dividend received upon those advances from the estate of the son-in-law.

The costs of this rehearing I think must be governed by the agreement between the parties that the costs shall come out of the estate.

1862. December 17. 1863. January 21. Before the Lord Chancellor Lord WESTBURY.

A trustee permitted his co-trustee, the father of one of the *cestuis que trustent*, to sell out the trust fund, the co-trustee depositing with him a packet of title-deeds by way of indemnity. The son on coming of age, in 1851, had an interview with the trustee upon the subject. In 1855, the father, when dangerously ill, spoke to the son, about the breach of trust, and desired him to call on the trustee, and obtain from him and keep the packet of deeds, which the son did. The son afterwards received a letter from his father, while still dangerously ill, requesting the son, in the event of the father's death, not to hold the trustee responsible, and enclosing the form of a memorandum for the son to copy, and sign, and send to the trustee, and by which the son, in consideration of the delivery up of the deeds, discharged the trustee from all liability. The father died in 1859, and in 1861 the son filed a bill, seeking to make the trustee liable for the breach of trust. *Held*, that the son had by his conduct so acquiesced in the breach of trust as to preclude him from complaining of it.¹

THIS was an appeal from the decree of the Master of Rolls, directing the appellant Joseph Green Bidwill to make good moneys of which he was a trustee.

¹ See *Lewin Trusts* (5th Eng. ed.), 661, 664, and cases in note (c); *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 74, note; *Burrows v. Walls*, 5 De G., M. & G. 233, and cases in notes (1) and (2); *Kerr F. & M.* (1st Am. ed.) 179, 180, 298-303; 1 *Sugden V. & P.* (8th Am. ed.) 262; *Perry Trusts*,

The bill was filed by Henry Arundel Martyn Farrant, and, as amended, stated in substance as follows:—

William Tucker, who died on the 25th of August, 1819, by his will dated the 7th of June, 1819, bequeathed to his nephews Arundel Radford and John Radford a sum of 1000*l.* upon trust to pay the interest thereof to Harriet Radford for her life, and after her death upon trust to divide the principal between her children equally. The will contained a power to appoint new trustees.

By an indenture dated the 15th of November, 1838, and made between Sarah Radford, widow, of the one part, and the defendant Joseph Green Bidwill and Frederick Granby Farrant (the plaintiff's father) of the other part, the appellant Joseph Green Bidwill and Frederick Granby Farrant were appointed trustees of the will in the place of Arundel Radford and John * Radford, * 108 and the sum of 970*l.*, being the legacy of 1000*l.* less duty was paid to them as such trustees, to be held by them on the trusts of the will, and was duly invested by them on the trusts of the will in the purchase in their names of bank 3*l.* per cent annuities.

Harriet Radford intermarried with Frederick Granby Farrant in or about the year 1826, and died on the 16th of August, 1832, at which time the plaintiff and his sister Myra Mary (afterwards the wife of the defendant William Jenny Pengelly), who were the only children of the marriage, were still infants.

Frederick Granby Farrant died on the 14th of February, 1859, having made a will dated in the year 1855.

At and for some time before Frederick Granby Farrant's death there was no specific fund or sum representing the plaintiff's interest in the trust fund. In fact the trust fund had many years before been sold by the appellant and Frederick Granby Farrant, and the proceeds thereof had, by the appellant's permission, been received by Frederick Granby Farrant; on which occasion the latter had purported to secure its repayment by depositing with the appellant certain indentures of lease and release dated the 4th and 5th of September, 1829, being a conveyance to Frederick Granby Farrant in fee-simple of five dwelling-houses in the parish of St. Sidwell, in the city of Exeter, and certain indentures of lease and release of the 17th and 18th of April, 1834, being a convey-
 § 851; *post* 120, note (1); *Jones v. Higgins*, L. R. 2 Eq. 538; *Hodgson v. Bibby*, 32 Beav. 221.

ance to Frederick Granby Farrant in fee-simple of another house in the same parish, known as No. 1, York Buildings, and also certain earlier title-deeds relating to the same six houses.

* 109 * When the deeds were deposited with the appellant by Frederick Granby Farrant, there was enclosed in the packet containing them the following memorandum: "Deeds deposited with J. G. Bidwill as security for 970*l*. as co-trustee with F. G. Farrant."

In or about February, 1855, the plaintiff was directed by his father to call on the appellant, who, as the plaintiff's father said, would give him something. The plaintiff did so, and received from the clerk of the appellant these deeds and memorandum, which he delivered to his father without opening them, but he was directed by his father to retain, and in fact had ever since retained them.

The bill then stated that the appellant alleged that he shortly afterwards received a document signed by the plaintiff, discharging the appellant from all liability as trustee. But the plaintiff stated that if he ever signed such a document, of which he had no recollection, he must have done so under the orders of his father (then dangerously ill), and that the document having been signed under these circumstances and without legal advice and without consideration could not, as the plaintiff insisted, amount in equity to a discharge of the appellant from his liability.

The prayer was for an account of what was due to the plaintiff for principal and interest in respect of his moiety of the trust fund, and that the amount found due on taking such account might be raised by a sale of the above-mentioned six houses, or of such part of them as might be necessary; also that any deficiency which might remain after applying the proceeds of the six houses in satisfaction of what was due to the plaintiff might be borne by the appellant personally and the estate of Frederick Granby

* 110 Farrant in such order, as between * the said estate and the last-named defendant the Court might think just, and that, if necessary or proper, it might be declared that the release alleged by the appellant to have been given to him did not, even if given, release him in equity from the plaintiff's claim.

The case made by the appellant's answer was to the following effect:—

Some time in 1847, Frederick Granby Farrant applied to the

appellant to do some act to enable the former to receive and make use of the principal trust moneys held by them under the will, and that being taunted with standing in the way of the family's welfare and benefit, the appellant acquiesced in his proposal, and did what was necessary to enable Frederick Granby Farrant to draw the amount from the bank where it was deposited. Frederick Granby Farrant then sent the appellant a sealed package, which the latter understood contained the deeds, and which he gave to his clerk to place in his strong-box for safe custody; but the appellant stated, that he never opened this package nor looked upon any indorsement on it, if there was any, as to which he was entirely ignorant.

In the commencement of the year 1855, the plaintiff called on the appellant, and stating that he was of age, asked for a settlement of his trust money, as to which the appellant referred him to his father, as the acting trustee.

When the plaintiff was gone, the appellant wrote a letter to Frederick Granby Farrant, telling him of the plaintiff's application, and complaining of the manner of it, and desiring that Frederick Granby Farrant would so arrange with the plaintiff, that the appellant might not be again exposed to his applications. Such letter * the appellant sent, together with the sealed * 111 package deposited with him, to Frederick Granby Farrant, in order that the latter might settle with the plaintiff. The appellant never saw the plaintiff again on the subject, but believed that he made some arrangement with Frederick Granby Farrant, under which the latter gave him security for his moiety of the trust fund; for on the 26th of February, 1855, the appellant received through the post from the plaintiff a document entirely in the plaintiff's own handwriting, which was as follows:—

“In consideration of certain deeds of conveyances deliver'd to me, I hereby release, quit and discharge Joseph Green Bidwill, Esq., from all claims and liabilities I may have on him as one of my trustees under the will of the late William Tucker, Esq. Dated 26th February, 1855.

“H. A. M. FARRANT.”

From that time to the time of the death of Frederick Granby Farrant the appellant had no communication whatever with the plaintiff.

Evidence was gone into, the effect of which is stated in the Lord Chancellor's judgment.

The case came on for hearing before the Master of the Rolls on the 12th of November, 1862, who was of opinion, that the plaintiff was entitled to a decree; and directed an account to be taken of what was due to the plaintiff for principal and interest in respect of his moiety of the trust fund of 1000*l.*, and ordered that the appellant should pay to the plaintiff the amount which might appear due to him on taking such account, and that on such payment to the plaintiff, the plaintiff should deliver upon oath to the appellant the title-deeds deposited as a security with the appellant.

And his Honor further ordered, that the real estate of *112 Frederick Granby *Farrant, deceased, comprised in such title-deeds should be sold with the approbation of the Judge, and that the money to arise by the sale should be paid into Court. And his Honor declared, that in the first instance out of the money when so paid into Court, if sufficient for that purpose, but if insufficient, then out of the general assets of the estate of Frederick Granby Farrant deceased, the appellant was entitled to be recouped the amount he should have paid to the plaintiff as aforesaid, including the plaintiff's costs thereby directed to be taxed and paid by the appellant.

The appeal was from the whole decree.

Mr. Selwyn and *Mr. Wickens*, appeared for the plaintiff, the respondent.

Mr. Southgate and *Mr. Hislop Clarke*, for the defendant, the appellant.

The Lord Chancellor during the argument referred to *Walker v. Symonds*. (a)

Judgment reserved.

1863. January 21.

THE LORD CHANCELLOR. — As my judgment depends on the particular circumstances of this case, I think it necessary to state them fully.

(a) 3 Swanst. 1, 64, 75.

Under the will of a testator who died in 1819, a sum of 1000*l.* was bequeathed upon trust for one Harriet * Radford * 113 for life, and at her death for her children equally.

Harriet Radford intermarried with Mr. Farrant, the father of the plaintiff. She died in 1832, having had two children only, the plaintiff and his sister, who became entitled to the legacy.

In 1838, Mr. Farrant and the defendant Bidwill were duly appointed trustees of the will.

The sum of 970*l.* was the clear amount of the legacy, and it was invested in the purchase of bank annuities.

Before either of the children attained twenty-one, Mr. Farrant prevailed on his co-trustee, the defendant Bidwill, to lend him the whole trust funds, and accordingly the bank annuities were sold and the proceeds paid to Mr. Farrant.

As security for the trust fund, Mr. Farrant deposited with the defendant Bidwill the title-deeds of six freehold houses situate in the city of Exeter, of which Mr. Farrant appears to have been seised in fee-simple.

On the sister's marriage, her share of the trust fund was paid or satisfied by her father. Afterwards, in March, 1851, the plaintiff attained his majority. His statement is, that on the 21st of May, 1851, he called on the defendant Bidwill, and requested payment of 485*l.*, being his moiety of the trust fund. He appears therefore, to have been fully aware of the amount of the principal trust money, and that it was not invested in the funds. The plaintiff goes on to say that he was referred by the defendant to his, the plaintiff's, father as the acting trustee, and some angry words having passed, he * the plaintiff said that he would * 114 place the matter in the hands of his professional adviser.

The plaintiff says that the defendant Bidwill then told him that he Bidwill never had had the trust money or any thing to do with it; that the plaintiff's father had had the money, but that he Bidwill held security for the plaintiff's interest, of considerable value, and given for a larger amount than the plaintiff's claim of 485*l.*, and that the securities were in Bidwill's strong-box and perfectly safe, and he again requested the plaintiff to apply to his father, but which the plaintiff declined to do.

From this account of the interview, taken from the plaintiff's own affidavit, it is plain that after it he knew (if he did not know the fact before), that the trust money was in the hands of his

father, and that Bidwill had received from the father the deeds of some freehold houses as a security for it. The whole of the plaintiff's statement as to the representations alleged to have been made by Bidwill of the sufficiency of the security and the value of the houses is positively denied by that defendant.

In July, 1851, some correspondence took place between the plaintiff and the defendant Bidwill, and from the language and contents of the plaintiff's letters they would seem to have been written with the assistance of some professional adviser. The plaintiff was again referred by Bidwill to his father, to whom the plaintiff's letters were sent; and from the father the plaintiff received, on the 31st of July, 1851, or a day or two afterwards, a note or written message in the following words:—

“ Mr. Bidwill has already told you truly that he had nothing to do with the money, but held securities for a larger amount
 * 115 than was due to you, so that you are * not likely to be robbed by your father. There are no securities for your money alone, and therefore they cannot be handed over to you, but you will get your hard cash as early as I can possibly manage it. If this does not suit you, it would be well to consult some respectable person, either lawyer or other, to learn what would be the fitting course for you to adopt. Pester Mr. Bidwill in my stead is a shallow artifice.”

I think the plaintiff's conduct is correctly described by the father's expressions. He knew that his father had received the money and was his trustee and debtor, and therefore to demand payment of Mr. Bidwill was but a device to avoid a direct application to the father.

The plaintiff says that in his reply he begged his father to have a better opinion of him, and that he then allowed the matter to rest and ceased to make any further application to Mr. Bidwill; but he insists that his acquiescence was throughout occasioned by his reliance on the alleged statement of the defendant Bidwill that the security was of ample value. I have already observed that Bidwill swears he never made any such statement, and the plaintiff's oath not being corroborated, I could not make a decree upon his evidence alone; but as this alleged fact of the statement by Bidwill forms the basis of the plaintiff's case, and the main ground

on which he meets the case against him of delay and acquiescence, I shall examine the subject more minutely.

Taking the whole of the plaintiff's statement of the interview and conversation with Bidwill in May, 1851, it is plain that Bidwill was ignorant of the subject, and the plaintiff must have perceived that Bidwill made no * statement from personal * 116 knowledge, but that what he said was merely the repetition of what had been told him, and most probably by the plaintiff's father. The words of the affidavit are: "He (Bidwill) further said he had not opened the packet of deeds containing the security, nor did he know what the security was, but he believed that it was upon some freehold houses of very ample value." The plaintiff is referred to his father for information; and under these circumstances, if the conversation passed as is here represented, but which is wholly denied, the plaintiff was hardly justified in relying upon it as a representation of the value of the security. But assuming that there was a positive statement by Bidwill of the sufficiency of the security, I am still to consider whether I can believe, having regard to the circumstances of the case, that the plaintiff remained until the death of his father in ignorance of the real nature of the security; and if he was not ignorant, he could not have relied on the representation of Bidwill.

The plaintiff, when he came of age in March, 1851 and afterwards down to December, 1854, was an inmate in his father's house as part of his family. It is true that the plaintiff denies that he constantly lived there, but he does not state that he had any other place of abode. The father was a surgeon residing in the city of Exeter. He seems to have been possessed of little or no property, except the six houses the subject of this security. They were all situate in the city of Exeter, and in one of them the father lived. The son does not appear to have had any occupation until about the end of the year 1854, when he obtained a commission in a militia regiment. He admits he was told by Bidwill that the security consisted of freehold houses of the father, and it is difficult to believe that he did not know which were the houses, or that he could suppose his * father was the owner of some * 117 other houses that formed the security.

The plaintiff does not by any thing that he has sworn exclude this natural inference, for although he states that he did not know the contents of the packet of deeds until after his father's death,

that statement is consistent with the fact that he was personally well acquainted with the six houses of his father in Exeter, and knew that they were the subject of his security.

But I do not feel it to be necessary that my judgment should rest upon the conclusion derived from these circumstances. For the plaintiff's further statement is, that in February, 1855, his father, whilst lying dangerously ill in bed in his house in Exeter, spoke to him the plaintiff upon the subject of his trust money of 485*l.*, and desired him to call on Mr. Bidwill who had something for him. The plaintiff gives no further account of the conversation, but he states that he went to the offices of Mr. Bidwill, and received from a clerk a packet, which he brought back to his father and was desired to keep, and which he says he presumed contained the deeds and security for the money due to him.

The plaintiff states that he never opened the parcel or made any inquiry respecting it, but that he affixed his seal to it and deposited it with his bankers at Exeter. If (as I infer the fact to have been) the plaintiff was already well acquainted with the security, this statement is credible; but if not, it is hardly to be believed that a man who was anxious about the security for his money, of the nature of which he was ignorant, should not look into the parcel when given to him before he sealed and deposited it with his bankers. It is, however, immaterial, for I must impute to * 118 him the knowledge that he might * have obtained by examining the packet which was delivered to him as his property. If he did not examine it, it was, I think, because he was already well acquainted with the nature and subjects of the security.

The plaintiff further states, that in the month of February, 1855, he received a letter from his father, still dangerously ill, requesting the plaintiff, in the event of his, the father's death, not to hold Mr. Bidwill responsible for the 485*l.*, and enclosing the form of a memorandum for the plaintiff to copy and sign and send to Bidwill. The form or language of the memorandum so sent by the father to the plaintiff is not stated; but, in consequence of this request, the plaintiff wrote out, signed, and sent to Bidwill a document in the following words: —

“In consideration of certain deeds of conveyances deliver'd to me, I hereby release, quit and discharge Joseph Green Bidwill, Esq., from all claims and liabilities I may have on him as one of

my trustees, under the will of the late William Tucker, Esq. — Dated 26th February, 1855. — H. A. M. FARRANT."

This paper was sent to Mr. Bidwill by the plaintiff without any condition or qualification. Mr. Bidwill had a right to consider it as a discharge given by the plaintiff freely and deliberately, with full knowledge of his rights, and after he had satisfied himself of the sufficiency of that security which he had sometime before applied for and received. The plaintiff appears to have told his father that he had sent Bidwill a discharge.

The secret intention with which he acted is best described by himself.

With respect to his father, he tells us in his affidavit that he considered what he did as a matter of form to * soothe * 119 his father in what he believed to be his last illness.

With respect to Bidwill, he says that he signed the paper upon the express understanding and faith that the representations made to him on the 21st of May, 1851, by the defendant Bidwill, as to the ample nature of the security, were true, and that the packet handed to the plaintiff by Bidwill's clerk contained such ample security. The plaintiff does not, however, state that he expressed any thing of the kind to either his father or the defendant. The father lived until the 14th of February, 1859. The son never undeceived him as to his real intentions. He permitted his father to die in the belief that Bidwill had been effectually discharged. He permitted Bidwill also to remain under the same impression until the 10th of December, 1859, when he wrote a letter to Bidwill demanding payment of the 485*l.*; and in the month of April, 1861, the bill in the present suit was filed. Of the principles of the Court there can be no doubt. I do not mean to weaken them, and I will state them even more strongly than I remember to have seen them stated.

The duty of proving an effectual discharge lies on the trustee. Where a breach of trust has been committed, from which a trustee alleges that he has been released, it is incumbent on him to show that such release was given by the *cestui que trust* deliberately and advisedly, with full knowledge of all the circumstances, and of his own rights and claims against the trustee; for it is impossible to allow a trustee who has incurred personal liability to deal with his *cestui que trust* for his own discharge upon any other ground

than the obligation of giving the fullest information, and of showing that the *cestui que trust* was well acquainted with his own legal rights and claims, and gave the release freely and without pressure or undue influence of any description.¹

The question is, Do these requisites exist in the case before me? I am of opinion that they do; and further, that without the discharge the acts of the plaintiff amount to an acquiescence in the breach of trust, and an acceptance or adoption of the security given by his father.

During the argument I referred to two passages in the judgment of Lord ELDON in *Walker v. Symonds*, (a) in one of which it is said that the acquiescence of the *cestui que trust* in a breach of trust will release the trustee, and in the other that the *cestui que trust*, proving that the breach of trust was neither authorized nor adopted by him, may proceed against the trustees. Acquiescence or adoption may be an answer to the *cestui que trust*; and, in this case, I think both are found.

From the narrative which I have given of the plaintiff's acts, taken almost entirely from his own affidavit, it is plain that, from the time he attained majority in March, 1851, ten years before the institution of this suit, he was well aware of his own rights and of the liability of Bidwill. He knew well the breach of trust which had been committed, by the money having been lent to his father. For the reasons which I have given, I impute to him full knowledge of the nature of the security, and of his father's houses which were the subject of it. In January, 1855, without any solicitation from Bidwill, he voluntarily and deliberately requests that the security which his father had given might be handed over to him, and he accepts and treats it as his property. After

(a) 3 Swanst. 64, 75.

¹ See 1 Sugden V. & P. (8th Am. ed.) 252, and cases in note (g), 253 and notes; *Montmorency v. Devereux*, 7 Cl. & Fin. (Am. ed.) 188, and note (1), and cases cited; *Negley v. Lindsay*, 67 Penn. St. 217; *Savery v. King*, 5 H. L. Cas. 627; *Wall v. Cockerell*, 10 H. L. Cas. 229; *Williams v. Reed*, 3 Mason, 405; *Stump v. Gaby*, 2 De G., M. & G. 623, note (1), and cases; *Bond v. Bond*, 7 Allen, 1; 1 Leading Cas. in Eq. (3d Am. ed.) [141], [142], 207, 208, and cases cited; *Skottowe v. Williams*, 3 De G., F. & J. 535, and note (1); *Kerr F. & M.* (1st Am. ed.) 298-302; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 74; *Lloyd v. Attwood*, 3 De G. & J. 615.

an * interval quite sufficient to enable him to become fully * 121 acquainted (if he was not already) with the nature and value of the security, he freely and without pressure sends an ample discharge to Bidwill. I say without pressure, for I cannot regard the entreaty of his sick father as amounting to undue influence. His design in giving the discharge is apparent, it is even avowed by himself. In plain words, it was to cheat his father and Bidwill into the belief, so long as the father lived, that his claim against Bidwill was relinquished, and then to renew it as soon as the father had ceased to exist.

If I permitted this to be done successfully by means of the rules and principles of this Court, I should make them instruments for perpetrating the greatest fraud and injustice.

Therefore reverse the decree of the Master of the Rolls, and let so much of the plaintiff's bill as seeks any relief against Bidwill be dismissed with costs.

* BOLDING v. LANE.

* 122

1863. January 14, 21. Before the Lord Chancellor Lord WESTBURY.

An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the Statute of Limitations.¹

Therefore where the mortgagor was, but a second mortgagee was not, a party to a transfer of a first mortgage, the interest on which was, and was in the transfer recited to be, upwards of six years in arrear: *Held*, that notwithstanding this recital, the second mortgagee was entitled to redeem the first mortgagee on payment of principal and six years' arrears only of interest.

THIS was an appeal from a decision of the Vice-Chancellor STUART holding in a foreclosure suit, instituted by a first mortgagee against puisne encumbrancers and the heir of the mortgagor, that the puisne encumbrancers could not effectually set up the Statute of Limitations, and could only redeem on paying the whole arrears of interest exceeding six years' arrears.

The first mortgage was dated the 9th of May, 1834, and thereby

¹ See 1 Dart V. & P. (4th Eng. ed.) 367; *Coope v. Cresswell*, L. R. 2 Ch. Ap. 123, 124.

Joseph Lane, the owner in fee, demised to Thomas Lane and Walter Sprott, who were the trustees of the settlement made on the marriage of Edmund and Ann Bennett, two pieces of land at Stowheath, in the parish of Wolverhampton, for 1000 years without impeachment of waste, subject to a proviso for cesser of the term on payment by Joseph Lane to Thomas Lane and Walter Sprott of a sum of 1281*l.* 12*s.* 3*d.* and interest.

Joseph Lane died on the 25th of August, 1831, having by his will devised to Thomas Lane, who was his nephew and heir-at-law, his freehold land and hereditaments at Stowheath.

By indentures dated respectively the 23d of February, 1846, Sydney Alleyne was appointed a trustee of the 1281*l.* 12*s.* 3*d.* jointly with Thomas Lane, in the place of Walter Sprott, who had died on the 3d of May, 1844, and the mortgaged premises were assigned to and became vested in Thomas Lane and Sydney Alleyne, subject to redemption by Thomas Lane.

* 123 * In September, 1847, part of the mortgaged land was sold, and 250*l.*, the price of the part sold, paid to Thomas Lane and Sydney Alleyne in part discharge of the mortgage debt of 1281*l.* 12*s.* 3*d.*

The second mortgage on the property was effected by an indenture dated the 1st of May, 1848, and made between Thomas Lane (in his character of owner of the reversion in fee of the mortgaged premises expectant on the mortgage term of 1000 years) of the first part, Maria Lane of the second part, John Elworthy Cutcliffe and Elizabeth his wife of the third part, Anthony Boulton and Harriet his wife of the fourth part, and Anthony Boulton and John Elworthy Cutcliffe of the fifth part, and thereby Thomas Lane conveyed to Anthony Boulton and John Elworthy Cutcliffe in fee so much of the premises comprised in the mortgage of 1831 as were not sold in 1847, upon trust to sell the same and out of the proceeds and mesne rents and profits to reimburse themselves the expenses attending the execution of the trusts and then to pay interest on a sum of 827*l.* 8*s.* 11*d.* due to Maria Lane, and interest on a sum of 718*l.* 7*s.* 9*d.* due to the trustees of a settlement made on the marriage of Elizabeth Cutcliffe with a former husband named William Dick, and after payment of such interest to pay to Maria Lane or her assigns, and to the trustees for the time being of the marriage settlement of Elizabeth Cutcliffe and William Dick respectively, the above sums of 827*l.* 8*s.* 11*d.* and 718*l.* 7*s.* 9*d.*

without preference; and upon further trust to pay to Anthony Boulton the sum of 461*l.*; and to pay out of the surplus (if any) to Maria Lane and Anthony Boulton and their respective assigns, the sums of 2200*l.* and 1500*l.* without preference; and to pay the ultimate residue to Thomas Lane.

In 1852 a further part of the mortgaged premises was * sold, and Anthony Boulton and John Elworthy Cutcliffe * 124 concurred with Thomas Lane and Sydney Alleyne in the conveyance to the purchasers, but the purchase-money, 627*l.* 5*s.* 3*d.*, was paid to Thomas Lane and Sydney Alleyne in further reduction of their mortgage debt.

By an indenture dated the 11th of November, 1856, on which the question turned, and which was made between Thomas Lane of the first part, Thomas Lane and Sydney Alleyne of the second part and the plaintiff of the third part, after reciting that there remained due on account of the principal money secured by the indenture of the 9th of May, 1831, the sum of 404*l.* 7*s.*, and that there was also due on such security the sum of 302*l.* 15*s.* 10*d.* for arrears, of interest, as Thomas Lane thereby admitted, it was witnessed that in consideration of 555*l.* 14*s.* 11*d.* by the plaintiff paid to Thomas Lane and Sydney Alleyne, Thomas Lane and Sydney Alleyne assigned to the plaintiff the principal sum of 404*l.* 7*s.*, secured by the indenture of the 9th of May, 1831, and all interest then due or to become due thereon, and the full benefit of all securities for the same moneys and every part thereof and the two pieces of land at Stowheath (except such portions as had been sold) for the remainder of the 1000 years' term, subject to the then subsisting equity of redemption under the indenture of the 9th of May, 1831.

Thomas Lane died in December, 1859, intestate. Anthony Boulton died in May, 1854, and Samuel John Maclurcan was the acting executor of his will.

The persons now entitled to the 718*l.* 7*s.* 9*d.* were James Edward Jackson Riccard (the sole surviving trustee of the marriage settlement of Elizabeth Cutcliffe * and William * 125 Dick) and Anna Dick, the only child of that marriage, who was the only person besides her mother beneficially interested under that settlement.

No sale was ever made under the trusts of the indenture of the 1st of May, 1848, and the moneys secured by it remained unpaid.

There was owing to the plaintiff also the whole of the principal sum assigned to him by the indenture of the 11th of November, 1856, and a large arrear of interest.

On the 24th of July, 1861, he filed the bill in the present suit, praying for the usual foreclosure decree. In answer thereto, the defendants John Elworthy Cutcliffe and his wife submitted, that the sum of 302*l.* 15*s.* 10*d.*, arrears of interest, expressed to be assigned by the indenture of the 11th of November, 1856, could not be turned into principal so as to carry interest, and that no more than six years' arrears of interest could be recovered by the plaintiff against the estate. The defendants Maria Lane and Samuel John Maclurcan also by their answer submitted, whether in taking the account of what was due to the plaintiff, he would be entitled to arrears of interest for more than six years as against those defendants or either of them. The defendants claimed the benefit of the Statute of Limitations as fully as if they had pleaded it.

The cause came on for hearing on motion for decree, as reported in Mr. Giffard's Reports, (a) and by the decree under appeal it was declared that the plaintiff was entitled to the 302*l.* 15*s.* 10*d.*, being the arrears of interest due on the 11th of November, 1856,

and to all subsequent interest which had accrued due on the * 126 principal * sum of 407*l.* 7*s.*, secured by the indenture of the 9th of May, 1831, and transferred to the plaintiff by the indenture of the 11th of November, 1856, and also to the principal money due under the same indenture; and the decree proceeded to grant relief on the footing of the declaration.

The defendants Maria Lane, J. E. J. Riccard, Elizabeth Cutcliffe and Anna Dick appealed from so much of this decree as declared the plaintiff entitled to the 302*l.* 15*s.* 10*d.* arrears of interest due on the 11th of November, 1856, and to all subsequent interest, and prayed a declaration that he was entitled as against them to six years' arrears of interest only up to the time of the institution of this suit, and consequential relief.

Mr. Bacon and *Mr. W. W. Karlake*, for the appellants.— Inasmuch as the puisne encumbrancers were no parties to the deed of the 11th of November, 1856, the recital therein contained of

arrears of interest being due could not bind them. The recital, although an acknowledgment by a person liable to pay (a) the

(a) The sections of the Act on which the argument turned were the following:—

Sect. 1. "That . . . except where the nature of the provision or the context of the Act shall exclude such construction . . . the word 'person' shall extend to . . . a class of creditors or other persons as well as an individual."

Sect. 28. "That when a mortgagee shall have obtained the possession or receipt of the rents and profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor or some person claiming his estate, or the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case, no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment signed by one or more of such mortgagees or persons shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land, or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent . . ."

Sect. 40. "That after the 31st day of December, 1833, no action or suit or other proceeding shall be brought to recover any sums of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given."

Sect. 42. "That after the said 31st day of December, 1833, no arrears of

* 127 interest, still was * not an acknowledgment by all the persons liable to pay, or entitled to pay, the interest, and consequently did not take the case out of the statute.

* 128 * [The Lord Chancellor referred to *Hopkinson v. Rolt. (a)*]

The principle of that case is that the first mortgagee and the mortgagor shall not affect the right of a second mortgagee. The arrears of interest, *ultra* the six years in this case, are in the same position as the further advances made by the first mortgagee in that after notice of the second mortgage. It was his own fault that he permitted the interest to fall into arrear. It was suggested below that the second mortgagee could not complain of the whole arrears of interest on the first mortgage being charged against him, because the statute informed him that an acknowledgment made behind his back by the mortgagor would let in all the arrears. This however was the same argument as that unsuccessfully urged in *Hopkinson v. Rolt*. In that case, when the second mortgagee advanced his money he had notice that the first mortgage was given to secure future advances as well as the gross sum then due. But it was held that the facts of a second mortgage being made and notice thereof being given to the first mortgagee put a stop to the further advances. That reasoning applies to the present case. If

there had been no second mortgage, an acknowledgment by
* 129 the mortgagor would * have let in all the arrears; but the fact that there is a second mortgage prevents this. It is

rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent signed by the person by whom the same was payable or his agent: Provided nevertheless, that where any prior mortgagee or other encumbrancer shall have been in possession of any land, or in the receipt of the profits thereof within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other encumbrance on the same land, the person entitled to such subsequent mortgage or encumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or encumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the term of six years."

(a) 9 H. L. Cas. 514.

contrary to justice that one person should be bound by the admissions of another, except in cases of continuing joint contract. *Putnam v. Bates*, (a) *Fordham v. Wallis*. (b) In the last-mentioned case, executors, who were also trustees of real estate not devised subject to the payment of debts, paid interest due on a debt of their testator; yet it was held that such payment made by them in their character of executors did not affect the real estate, although in their own hands, because it was in their hands in the character of trustees; and in his judgment in that case the Vice-Chancellor TURNER says, speaking of *Putnam v. Bates*: "The case rests upon the decisions in *Atkins v. Tredgold* (c) and *Slater v. Lawson*, (d) and the principle of those cases was this,—that one party was not to be bound by the admissions of another except in cases of continuing joint contract. This principle is surely founded in justice. Apart from purely legal considerations, it cannot, I think, be doubted, that it ought not to be in the power of any person by his admissions to revive a right against another, which, but for that admission, would have been wholly extinguished, as was the case in *Channell v. Ditchburn*." (e) Those remarks are precisely applicable to the present case.

Then, as to the words of the 42d section of the statute, the expression "the person by whom the same was payable" means, when interpreted by the enactment contained in the 1st section, all the persons by whom the interest is payable; and so far as the 42d section goes, the mortgage must be looked at, and not merely the personal liability of the mortgagor under * his * 130 covenant to pay. In other words, the persons by whom the interest is payable include persons incidentally liable to pay, as well as the mortgagor, who is personally liable on his contract. The section must be read distributively. An acknowledgment by all the persons entitled to redeem will bind all. An acknowledgment by one only of such persons will bind only that one person.

They also cited on the first point *Lord St. John v. Boughton*, (g) *Roddam v. Morley*, (h) *Francis v. Groves*. (i)

(a) 3 Russ. 188.

(b) 10 Hare, 217.

(c) 2 B. & C. 23.

(d) 1 B. & Ad. 396.

(e) 5 M. & W. 494.

(g) 9 Sim. 219.

(h) 1 De G. & J. 1.

(i) 5 Hare, 39.

Mr. Malins and *Mr. W. F. Robinson*, for the plaintiff, the respondent. — Before this statute passed, a puisne encumbrancer took his security subject to the first mortgagee's right to recover twenty years' arrears of interest. The statute cut down the rights of the first mortgagee, and must therefore be construed strictly. The expression "person by whom the interest was payable" in the 42d section primarily means the mortgagor, and a secondary meaning should not be given to the phrase so as to curtail the first mortgagee's rights further than the letter of the statute has that effect; the proviso at the end of the 42d section shows that the legislature had the case of several encumbrancers in its contemplation when sanctioning the enactment contained in that section. If it had intended to include a subsequent mortgagee under the words "person by whom the interest was payable," it would have used apt words to describe him, as indeed it has in the latter part of the section. If the appellants' construction is to prevail, it might be that a first mortgagee would be in a worse position than a

* 131 * subsequent encumbrancer; for if a second mortgagee were in possession, then a third mortgagee would, under the proviso at the close of section 42, recover all his arrears of interest, whereas the first mortgagee would only have six years' arrears. Then the 40th section shows that the word "payable" means payable by the person by whom the principal is payable.

The 28th section shows that when it was intended to enact that an acknowledgment given by one person should not bind another not a party to it, the legislature said so in so many words. In the 40th and 42d sections, the effect of an acknowledgment is not so restricted as it is in the 28th section. The conclusion is obvious, that the legislature intended an acknowledgment under the 40th and 42d sections to bind every one.

They also commented on and distinguished the cases cited on behalf of the appellants, and referred to Sugden's Real Property Statutes. (*a*)

Mr. Bacon, in reply.

Judgment reserved.

(*a*) Page 132 (2d ed.).

January 21.

THE LORD CHANCELLOR. — This case depends on the true construction of the 42d section of the Act for the Limitation of Actions and Suits relating to real property, viz., the 3 & 4 Will. 4, c. 27.

The Vice-Chancellor has decided, that where there are successive mortgages, and arrears of interest for more than six years are due on the first mortgage, an acknowledgment in writing that such arrears are due, * signed by the mortgagor, will * 132 enable the first mortgagee to recover the whole amount of the arrears out of the land as against the second and subsequent mortgagees.

In his reasons for this decision, the Vice-Chancellor apparently holds that the words in the 42d section, viz., "the person by whom the same was payable," mean the person who was liable at law to pay the interest under the contract, that is the mortgagor or his representative, and accordingly he considers the second mortgagee as not included within those words.

This decision leads to very extraordinary and alarming consequences. If it be well founded, then according to the true intent and meaning of this statute, the right of one man may be taken away by the act of another. If the second mortgagee be in possession, and the first mortgagee seeks to recover his principal and arrears of interest for twenty years by a suit for foreclosure or sale, is the second mortgagee to be at liberty to plead or insist on this enactment? It is impossible to deny his right so to do. But according to this decision, if the first mortgagee obtains at any time the acknowledgment in writing of the mortgagor or his representative, the right of the second mortgagee is defeated, and all the arrears are recoverable against the second and subsequent mortgagees. That is to say, the mortgagor or his representative, who may have no interest whatever in the lands (for the ultimate equity of redemption may not be worth one shilling), shall be enabled to charge the estate anew with any amount of arrears of interest as against the second and subsequent mortgagees.

The Court is bound by every principle of judicial interpretation to find, if possible, a construction of the statute which does not involve consequences so inconsistent with * natural * 133 justice. Speaking with great respect to the Vice-Chancellor, the vice of the decision lies in the limited interpretation which is put upon the words "by whom the same was payable."

These words do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears may be enforced by any action or suit, and by whom therefore, as they have a right to pay such interest in redemption of their land, interest may be properly said to be payable.

If a legacy is by will charged upon land, which is then specifically devised, the devisee is not liable by any contract to pay the legacy or the interest thereon, but he is, nevertheless, a person by whom such legacy and interest are payable;¹ for he is entitled to redeem the lands devised to him.

In truth, these words of the statute, far from having the limited construction of the Vice-Chancellor, appear to have been selected as a description capable of including not only every person liable to be sued at law, but every person who, having an interest in the land sought to be charged, might be properly sued as a defendant in a suit in equity, brought to enforce payment of the principal and interest out of such land.

If this be so, it follows as a necessary consequence, that it was not the intention nor is it the effect of the section to give to the mortgagor or other person, who is "by law compellable to pay the interest," a statutory power to deprive, by his acknowledgment given to a prior encumbrancer, the subsequent encumbrancers of the benefit of the statute, which would be monstrously unjust, but to enact a plain and simple rule that no person having a
 * 134 charge on lands shall recover more than six *years' interest on such charge against any other person having an interest in the lands without an acknowledgment in writing, signed by such person or by some former owner from whom the interest is derived.

This is the natural and just interpretation of the 41st and 42d sections, and makes them consistent with the language of the 28th section of the statute.

¹ In *Pickering v. Pickering*, 6 N. H. 120, it was held that when a devisee accepts land charged by will with the payment of a legacy, he becomes a debtor, by reason of the land, for the legacy, and is bound like any other debtor to pay the legacy without a demand. He stands on the same ground as if he had expressly promised to pay. See *Swasey v. Little*, 7 Pick. 296. So in *Adams v. Adams*, 14 Allen, 65, 66, *FOSTER J.*, said: "Upon the acceptance of such a devise, the law raises an implied promise by the devisee of the estate, in favour of the legatee of the money charged upon it." See also *Bowker v. Bowker*, 9 Cush. 519; *Felch v. Taylor*, 13 Pick. 133.

Therefore, reverse the order of the Vice-Chancellor, so far as it relates to the arrears of interest on the mortgage of 1831, and declare the plaintiff entitled to recover interest for the six years only which immediately preceded the filing of the bill, and let the plaintiff pay such costs (other than the costs of the rehearing) as have been occasioned by the larger claim of interest. The deposit must be returned.

WETHERELL v. WETHERELL.

.1863. January 16, 21. Before the Lord Chancellor Lord WESTBURY.

A testator directed that "the annual interest only" of the residue of his property, of whatever kind, should be divided into as many equal parts as there might be children of W., share and share alike, as each of the said children should come of age, and that in case any one of the said children should die without any children, then and in that case his or her share of the said annual interest should devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue should come into the hands of the grandchildren and great-grandchildren of W.

Held, that the children took immediate interests for life, and that there was no intestacy by reason either of incomplete disposition or of uncertainty or remoteness.

THIS was an appeal of some of the next of kin of a testator from the decision of Vice-Chancellor STUART, holding that there was no intestacy as to any interest in the testator's property.

* William De Caulier, the testator (for the administration * 135 of whose estate the suit was instituted), by his will dated the 13th of September, 1855, gave and bequeathed as follows:—

"After all my just debts and funeral expenses and the various legacies, donations, &c., herein specified are fully paid and settled with all the parties concerned therein, my will is, that the annual interest only of all the residue of my property of whatsoever kind or wheresoever placed shall be divided into as many equal parts or shares as there may be children living and begotten of the body of Thomas Nathaniel Wetherell . . . on the body of his present wife Louisa Wetherell, share and share alike as each of the said

children come of age. And in case any one of the said children shall die without any children of their own lawfully begotten, then in that case his or her share of the said annual interest (as the case may be) shall devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue comes into the hands of the grandchildren and great-grandchildren of the above-said Thomas Nathaniel Wetherell and of his wife Louisa Wetherell."

By the decision under appeal, which was made on further consideration on the 22d of July, 1862, and is reported in Mr. Giffard's Reports, (a) the Vice-Chancellor held that, according to the true construction of the will, the seven children of the plaintiff by Louisa Mary his wife (in the will called Louisa) who were living at the time of the death of the testator became entitled upon the death of the testator to the whole annual interest, rents, and profits of the clear residue of the real and personal estate as tenants in common for life, with remainder to all the children of such children; and as to the personal estate as tenants

* 136 * in common absolutely *per stirpes*; and as to the real estates as tenants in common in fee-simple *per stirpes*; and in case any one or more of the children of the plaintiff by the said Louisa Mary his wife should die without ever having had any child, then the share or respective shares of such child or children so dying, as well original as accruing, should go to the other or others of the said children of the plaintiff by the said Louisa his wife as tenants in common for life, with remainder to all the children of such other or others of the said children as should have any child, and as to the personal estate as tenants in common absolutely *per stirpes*, and as to the real estates as tenants in common in fee-simple *per stirpes*. The appellants were three of the testator's next of kin at the time of his death who had been served with the decree and allowed to attend the proceedings under it.

Mr. Hobhouse and *Mr. Fry*, for the appellants. — The rule which gives an absolute interest in a fund, where there is a general gift of the income, is not a very strong rule: *Blann v. Bell*, (b) and no gift to the children of Thomas Nathaniel Wetherell can be

(a) Vol. 4, p. 51.

(b) 5 De G. & Sm. 658.

implied from the gift over in their default: Jarman on Wills, (a) and *Ranelagh v. Ranelagh*, (b) there cited. The trusts for the grandchildren are void for remoteness and uncertainty.

Mr. Malins and *Mr. Pemberton* appeared for the children.

Mr. Greene and *Mr. Eddis*, for a grandchild of the testator.

* *Mr. Bacon* and *Mr. G. L. Russell*, for the plaintiff, the * 137 trustee of the will.

Mr. Hobhouse replied.

THE LORD CHANCELLOR. — The only question which I have to decide upon this appeal is, whether there is an intestacy as to the whole or any part of the personal estate. An intestacy might be produced in one of three ways, first (as has been suggested, I can hardly say argued) by the will being void altogether for uncertainty; secondly, by reason of the interest not being disposed of until the children attained twenty-one; or thirdly, in respect of the *corpus* not being validly given, by reason of the disposition of it in favour of a class which would comprehend objects not capable of taking without contravening the rule against perpetuities.

I am clearly of opinion that the will admits of a reasonable interpretation; and that therefore there is no ground for holding this to be a case of uncertainty or impossibility of construing the will. The first, therefore, and the more important question is, as to the gift of the life-interest. I am called upon by the appellants to hold that the life-interest is given to the children at twenty-one, and that consequently no interest vests in any child until he shall have attained that age. I am, however, clearly of opinion that this is not the natural meaning of the words. The words, collocated as they are, seem to point to the age of twenty-one as the period when the enjoyment or perception of the interest by the different children is to arise; but it is quite clear from the gift over, that upon the death of any child under the age of twenty-one years, and without leaving children, the * share of the child * 138 so dying would be transmitted to the surviving children.

(a) Vol. 1, pp. 527, 528 (3d ed.).

(b) 12 Beav. 200.

It is impossible, therefore, to refuse to hold that the children take immediately a share in the estate, and that the period for the enjoyment only is indicated by the words "as each of the said children come of age." I am of opinion that there is no void in the will, and that the interest, so far as the children are concerned, took effect immediately on the death of the testator, subject to the executory bequest over.

The next consideration is, whether the children take absolutely or a life-interest only, a question which I shall examine merely for the purpose of seeing whether there be or be not an intestacy, for I do not intend the order which I am about to make to prejudice or affect any question which may arise as between the respondents upon the construction of the will. Upon that point I think that we are not left to any rule of implication, because the direction is, that if a child should die without leaving any children, the share of that child shall go to the surviving children; and then follow the more material words, "and so on successively," that is from child to child "until the whole amount of the interest in the residue comes into the hands of the grandchildren and great-grandchildren." Those words are utterly inconsistent with the idea that the immediate children were intended to take an absolute interest which could only be divested in the event of the death of a child without leaving a child. I think it clear upon those words that the testator contemplated that the interest should go ultimately to the children of the children, and that consequently the children take not absolute interests, but interests for life only. That is confirmed by the use of the word "only" after the word "interest," which, translated into other language, would be

* 139 "the interest and nothing but the interest," and would * not, therefore, be within the ordinary rule that an indefinite gift of the interest amounts to a gift of the capital. It is clear from the word "only" that the children were intended to take nothing except the interest in the estate given during their lives.

The final question then comes, which is, whether the gift to the surviving children and so on successively until the whole amount comes into the hands of the grandchildren and great-grandchildren is void; which depends upon the question at what time, according to the will, the class is to be ascertained; the mere fact of the testator having included in the description of the class great-grandchildren or any number of future generations being immaterial,

provided the direction be explicit and clear that the class, whatever it be, is to be ascertained and to come into the enjoyment of the property within the time allowed by the rule against perpetuities. Now I think it is perfectly clear that in the event of a child dying without issue, the death of that child is the time when persons taking under the definition "grandchildren and great-grandchildren" are to enter into the enjoyment of that child's share. Therefore I do not find any necessity for holding that the mention of the words "great grandchildren" at all involves any intention of giving the interest to an object which would not of necessity come into being within the period of time allowed by the rule against perpetuities. It is not necessary for me to give any opinion as to whether the words "great grandchildren" are intended to operate only where there are no grandchildren, which may be one interpretation; or whether the words are intended to operate as giving to a grandchild who might die during the life of the parent a right to have his issue substituted in lieu of such grandchild; the time of enjoyment of course being all along remembered to be the same, * namely, the death of the child * 140 who is living at the date of the death of the testator. There might be another interpretation, namely, that the grandchildren and great-grandchildren, to be ascertained as a class at the death of the child, should take collectively and without distinction *per capita* amongst themselves. It is unnecessary to enter into this question, because it is quite sufficient to declare that the gift to the grandchildren is not void as contravening the rule of law against perpetuities.

Upon that ground, therefore, there is no intestacy in any respect arising from want of either effectual disposition or distribution at a proper period; and without determining what is the true construction of the rest of the will, but only holding it to be a legal and effectual disposition of the property, I dismiss this petition of rehearing; and as the next of kin have appealed in support of their own interests, I must of necessity dismiss the petition with costs. But the order must be so worded as not to affirm the decree or to prejudice any question upon the construction of the will as between the other respondents.

* 141

* PRATT v. BULL.

1863. January 12, 23. Before the Lord Chancellor Lord WESTBURY.

The 25th section of "The Probate Court Act" (20 & 21 Vict. c. 77), enacting that the Court shall have the like powers for enforcing its orders as are vested in the Court of Chancery in relation to suits depending therein, does not constitute an order of the Probate Court for payment of money a charge on land within the 1 & 2 Vict. c. 110, § 13.¹

THIS was an appeal from an order of Vice-Chancellor STUART allowing a demurrer to a bill seeking to have effect given to an order of the Court of Probate for payment of money as a charge on land under the 1 & 2 Vict. c. 110.

The bill stated the institution of a suit of *Bull v. Bull* in the Court of Probate; that it came on for trial before the Judge Ordinary on the 5th of February, 1861, and that, pending the trial, the suit was compromised, upon the terms expressed in an order of the Court, which was made with the consent of the parties, their counsel and attorneys, and whereby it was ordered that a verdict should be entered for the plaintiff in that suit on all the issues, and that he should pay to Mary Anne Bull, one of the defendants in the suit, an annuity of 25*l.* for her life, and that the order might be made a rule of the Probate Court at the instance of either of the parties, if the Court should see fit.

The bill further stated that Mary Anne Bull on the 8th of May, 1861, caused a memorandum or minute of the order to be left for entry in the Court of Common Pleas in pursuance of the Statute 1 & 2 Vict. c. 110; that on the 24th of July, 1861, the order was, upon her application, made a rule of the Court of Probate, and that she caused a memorandum or minute of such rule to be left on the 19th of October, 1861, for entry in the Court of the Common Pleas in pursuance of the same statute.

* 142 * That a memorandum of the annuity of 25*l.* was also, on the 19th of October, 1861, registered in pursuance of the Statute 18 Vict. c. 15, as against the estate of the plaintiff in the Probate Court suit, and that the registration remained in full force, and that Mary Anne Bull was still living.

¹ See 1 DART V. & P. (4th Eng. ed.) 430; 2 DAN. CH. PR. (4th Am. ed.) 1033, note (6).

That by an indenture of the 16th of November, 1861, Mary Anne Bull assigned the annuity to the plaintiff. That Thomas Bull, the plaintiff in the Probate Court suit, became, on the death of Thomas Bull the elder (the testator in that suit), absolutely and beneficially entitled to leasehold messuages described in the bill, subject as to part of them to a mortgage. That the order and rule of the Probate Court registered in the Court of Common Pleas had, under the Statute 1 & 2 Vict. c. 110, the same effect as a judgment in one of the Superior Courts of Common Law at Westminster; and that such registration constituted the annuity a valid charge upon all the freehold and leasehold hereditaments of the defendant, including certain leaseholds which were the property of the testator at the time of his death, and which under his will, passed to the defendant, and that the plaintiff was under the registrations and the deed of assignment of the annuity under which he derived his title entitled to such charge, and to the same remedies in this Court as against such leaseholds in the same manner and to the same extent as he would have been in case the defendant had had power to charge the same, and had by writing under his hand agreed to charge the same with the amount of the annuity during the life of Mary Anne Bull; that according to the true construction of the 13th section of the Statute 1 & 2 Vict. c. 110, the plaintiff had a right to enforce and to proceed in this Court to obtain the benefit of such charge, the rule of the Probate Court having * been obtained more than one year prior to the filing of * 143 the bill, and the obtaining of such rule and the subsequent registration thereof being tantamount to having entered up a judgment against the defendant on the 24th of July, 1861, and having subsequently registered it in the Court of Common Pleas.

The bill charged, that by the means and under the circumstances therein made to appear the plaintiff had become and was entitled to have the annuity during the life of Mary Anne Bull from time to time paid to him out of the rents and profits of the leaseholds or out of the dividends of the money to arise from the sale of the leaseholds, if any such sale should take place and be completed, which, as the bill alleged, was likely to happen unless the defendant was restrained from selling by injunction.

The prayer was for a declaration that the annuity was a charge upon the above-mentioned leaseholds as against the defendant and all persons claiming under him, and also upon the equity of redemp-

tion of such parts of the same leaseholds as were mortgaged, and the surplus moneys to arise by the sale or sales thereof respectively, and for consequential relief.

The defendant demurred generally to the whole bill for want of equity, and the Vice-Chancellor allowed the demurrer with costs. The case is reported in Mr. Giffard's Reports. (a)

Mr. Malins, Mr. Bilton and Mr. Henry Matthews, for the appellant, relied upon the 20 & 21 Vict. c. 77, § 25 and the 1 & 2 * 144 Vict. c. 110, §§ 18, 19. (b) They * argued that under

(a) Vol. 4, p. 117.

(b) The material portions of the enactments on which the argument mainly turned were the following: Stat. 1 & 2 Vict. c. 110, § 13: "And be it enacted, that a judgment . . . hereafter entered up against any person in any of her Majesty's Superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments . . . of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment-creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments and had by writing under his hand agreed to charge the same with the amount of such judgment debt and interest thereon: provided, that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment. . . .

Sect. 18. "And be it enacted, that all decrees and orders of Courts of Equity . . . whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such moneys or costs, charges or expenses shall be payable shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the Judges of the Superior Courts of Common Law with respect to matters depending in the same Courts shall and may be exercised by Courts of Equity with respect to matters therein

those provisions an order of the Probate Court when registered in the Court of Common * Pleas must have the same * 145 effect as the order of any of the other Courts of Law or Equity.

They referred also to the 83d section of the 20 & 21 Vict. c. 77, and to the Consolidated Orders of the Court of Chancery providing for the issue of writs of *feri facias* and *elegit* in cases of money or costs directed to be paid in any cause or matter pending in that Court. (a)

Mr. Bacon and *Mr. Hardy*, for the respondent.—They contended, that the right under the 13th section of the 1 & 2 Vict. c. 110, to file a bill on a registered order of the Court of Chancery was not part of the powers and jurisdiction of that Court for enforcing its order when made; and that although the effect of the 13th section was that the order was enforced, it was not enforced by the Court. The process authorized by that section was * not an enforcement of the decree already made, but an * 146 application to it of a new description of equitable relief.

depending . . . and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders . . . directed to be paid."

Sect. 19. "Provided always, and be it further enacted, that no judgment of any of the said Superior Courts, nor any decree or order in any Court of Equity . . . shall by virtue of this Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last-known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the Court, and the title of the cause or matter in which such judgment, decree, order . . . shall have been obtained or made, and the date of such judgment, decree, order, . . . and the account of the debt, damages, costs, or moneys thereby recovered or ordered to be paid shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order . . ."

Stat. 20 & 21 Vict. c. 77, § 25. "The Court of Probate shall have the like powers, jurisdiction, and authority for . . . enforcing all orders, decrees, and judgments made or given by the Court under this Act, and otherwise in relation to the matters to be . . . done by or under the orders of the Court under this Act, as are by law vested in the High Court of Chancery for such purposes in relation to any suit or matter depending in such Court."

(a) Order xxix, rules 6-10.

They also referred to the 17th, 18th, 20th, 21st, and 22d sections of the last-mentioned Act.

Mr. Malins, in reply, said that it had been admitted that the Court of Probate had power to issue execution. But no execution could issue except upon a judgment. The 13th section of the 1 & 2 Vict. c. 110, had the effect of putting the judgment creditor in the same position as that which he would have occupied had a charge in writing been given by the debtor. The legislature had the benefit of the suitor in view in the enactment of the 21 & 22 Vict. c. 77, which should accordingly receive a benignant interpretation.

Judgment reserved.

January 23.

THE LORD CHANCELLOR. — By the Act 1 & 2 Vict. c. 110, the legislature has given to every judgment and decree of the Superior Courts at Westminster, both of Law and Equity, a very peculiar effect and operation.

The judgment or decree is to operate as a charge upon the estate and interest of the debtor in any lands, tenements or hereditaments, and the creditor at the end of a year is to have the same remedies in a Court of Equity against the hereditaments so charged as he would be entitled to if the judgment debtor had by writing
 * 147 under his * hand agreed to charge his estate with the amount of such judgment debt and interest thereon.

This enactment gives to the creditor in respect of his judgment the character and right of an encumbrancer by contract on any interest which the debtor may have in real estate.

The object of the enactment was to enable the judgment creditor to attach and realize by suit in equity such estates and interests of his debtor as could not be extended under the writ of *elegit*. It gives a new right to the judgment creditor, to be prosecuted by a new suit in a Court of Equity, but the charge and the right of suit to enforce it cannot be called, with any propriety of language, part of the powers of the Court by which the judgment or decree was made for enforcing such decree or judgment. If it be so called, then a suit in chancery to have the benefit of a charge created by a judgment of the Court of Queen's Bench is part of the process,

jurisdiction and authority of the last-mentioned Court. Nor can the new suit that may be brought on the decree be denominated part of the power, jurisdiction or authority of the Court of Chancery for enforcing that decree, which words are the appropriate language for denoting the means which the Court has of giving effect to its decree, namely, process of execution of various kinds.

By the 25th section of the Court of Probate Act (20 & 21 Vict. c. 77), it is enacted that the Court of Probate shall have the like powers, jurisdiction and authority for enforcing all orders, decrees, and judgments made or given by that Court as are by law vested in the High Court of Chancery. The question in this cause is whether under and by virtue of this 25th section a judgment or order of * the Court of Probate for payment of money is attended * 148 with the same rights and consequences of creating a charge upon the interest in land of the person against whom it is made as are by the Statute 1 & 2 Vict. c. 110, given and attached to judgments and decrees of the Superior Courts of Law and Equity at Westminster existing at the time of passing that statute.

I am of opinion, for the reasons already stated, that the charge and right of suit in equity given by that statute to the persons who obtain decrees of the High Court of Chancery cannot, in any sense, be treated as part of the powers, jurisdiction and authority of the Court of Chancery for enforcing its decrees, and that these words in the 25th section of the Probate Act denote only the ordinary powers of enforcing decrees by writs of execution and process of contempt, and therefore I affirm the order which has been made, and dismiss the appeal with costs.

1862. November 10, 11, 12, 13. 1863. January 27. Before the LORDS JUSTICES.

A sum of 135,000*l.* was advanced to B. on mortgage in the name of S., who at the same time executed three declarations of trust, by which he declared that he held the mortgage on trust as to 105,000*l.* for E., as to 5,000*l.* for W., and as to 10,000*l.* for N., the rest of the money belonging to himself. N. was the solicitor both of E. and S., and was intrusted by E. with the investment of the 105,000*l.* E. appeared to have trusted to N., and to have made no inquiries as to the precise mode of investment, and it did not appear that he knew of the existence of the declaration of trust in his favour. He denied having known that the security was not taken in his own name, and it was not shown that he had any actual notice that it was not. S. afterwards transferred the mortgage for value to C., who had no notice of the trust, and delivered the deed to him. The legal estate in the mortgaged property was during the whole of the transactions outstanding. *Held*, that E., assuming him to have known S. to be his trustee, was not bound to make any inquiry into the acts or conduct of S. with regard to the security, and that his trusting to N. and omitting to make any inquiry as to the person in whom the mortgage was vested or in whose possession it was were not sufficient grounds for depriving him, as against C., of the benefit of the prior equitable title obtained by the declaration of trust, and that C.'s possession of the mortgage-deed being obtained through a breach of an express trust on the part of S. did not alter the case, and that in the absence of evidence that E. had notice of the dealings of S. with the security, E. was entitled to priority over C.¹

THIS was an appeal by the plaintiffs from an order of Vice-Chancellor Wood dismissing their bill.

The bill was filed by the trustees and one of the registered public officers of The London and County Banking Company, for the purpose of establishing and effectuating an assignment for securing the sum of 90,000*l.* made by the late John Sadleir to the trustees of the banking company of a mortgage upon the estates of the Duke of Buckingham, in the pleadings called the Chandos mortgage. The defendants to the suit were Thomas Joseph Eyre and several members of his family, who claimed to be entitled to the mortgage and the moneys secured by it in priority to the banking

¹ See *Newton v. Newton*, L. R. 6 Eq. 135; *Hunter v. Walters*, L. R. 11 Eq. 292.

company, and Anthony Norris and Joseph Bowker, who also claimed to be interested in the mortgage and the moneys secured by it, with the like priority. The defendant A. Norris was likewise the personal representative of John * Sadleir, and * 150 was made a party to the suit in that character.

The circumstances of the case were as follows: In the years 1844, 1845 and 1846, the late Duke of Buckingham had frequent occasion for temporary loans of money, and he procured these loans through the medium of the late John Sadleir. Amongst other sources which the late John Sadleir had for procuring these loans, he was on intimate terms with the defendant Anthony Norris, a solicitor and a partner in the firm of Norris & Sons, who were the solicitors of the defendant Thomas Joseph Eyre and his family, persons of considerable wealth, and were also solicitors of a gentleman of the name of Willoughby. Parts of the moneys procured by Sadleir to be advanced to the duke were lent by the defendant Thomas Joseph Eyre and by Willoughby through the medium of the defendant Anthony Norris acting as their solicitor. These moneys were lent by the defendant Thomas Joseph Eyre and by Willoughby on promissory notes and other personal securities given to them by the duke. They were also included with other moneys advanced by John Sadleir to or procured by him for the duke on bonds and warrants of attorney given by the late duke and the present duke to John Sadleir. At the end of the year 1846, the sum due in respect of these loans to the late duke amounted to 122,500*l.*, which had been thus provided: as to 6000*l.* by Willoughby, as to 18,500*l.* by the defendant Thomas Joseph Eyre, as to 3000*l.* by the defendant Anthony Norris, and as to the remainder by John Sadleir, either from his own personal resources or by moneys procured by him from the Tipperary Bank, of which his brother, James Sadleir, was the manager. John Sadleir, by letters written and signed by him, acknowledged himself to be a trustee of the securities * which he held for * 151 the 122,500*l.* for the defendant Thomas Joseph Eyre, for Willoughby and for the defendant Anthony Norris to the extent of the sums advanced by them respectively. The moneys which were thus lent to the late duke, some parts of which were raised by means of bills indorsed by John Sadleir, were so lent to the duke at high rates of interest, and the surplus interest, after deducting 12*l.* per cent upon the moneys advanced, was divided

between John Sadleir, Thomas Joseph Eyre and the defendant Anthony Norris.

Sometime about the latter end of the year 1846, it was ascertained that a sum of 92,474*l.* 15*s.* 7*d.* then due from the Portarlington estate to the defendant Thomas Joseph Eyre and the other members of his family, who were defendants to this suit, would be paid off in the early part of the year 1847, and it was proposed that this sum should be lent on mortgage of the Irish estates of the late and the present Duke of Buckingham, and time being required to effect the mortgage, it was by a memorandum of agreement dated the 17th of January, 1847, and a memorandum endorsed thereon, agreed, that the money should, in the mean time, be deposited as to 50,000*l.* in the London Joint-stock Bank, and as to 42,474*l.* 15*s.* 7*d.* in the Tipperary Bank, in the joint names of John Sadleir, of Henry Cory as a nominee of the late Duke of Buckingham, and of the defendant Anthony Norris as a nominee of the defendant Thomas Joseph Eyre, and that the money should carry interest from the 22d of January, 1847. The 92,474*l.* 15*s.* 7*d.* was received from the Portarlington estate on the 22d of January, 1847, and the sum of 50,000*l.* was thereupon deposited in the London Joint-stock Bank, and the 42,474*l.* 15*s.* 7*d.* in the Tipperary Bank, in the above-mentioned names. Difficul-

* 152 ties however afterwards * arose in the investment of these moneys on the proposed mortgage of the Irish estates, in consequence partly of a claim by John Sadleir to have the moneys which had been deposited applied to the payment of the bills which had been indorsed by him, and partly of some prior encumbrancers on the Irish estates having refused to release the estates from their encumbrances; and ultimately it was found impossible to carry into effect the arrangement for the investment of these moneys upon the Irish estates.

The 92,474*l.* 15*s.* 7*d.* was in fact dealt with as follows: The 50,000*l.* which had been lodged in the London Joint-stock Bank was transferred to the Tipperary Bank to the same account as the 42,474*l.* 15*s.* 7*d.*; 12,096*l.* 2*s.* 5*d.* was paid out of the moneys standing to that account to the defendant Thomas Joseph Eyre, in discharge of a mortgage which he had on other property of the late Duke of Buckingham, a mortgage which had no connection with any of the above-mentioned loans; 51,402*l.* 11*s.* 11*d.* was carried to the duke's loan account with the Tipperary Bank and went in

discharge of the bills which had been indorsed by Sadleir, and 82,453*l.* 9*s.* 10*d.* was carried to Sadleir's account with the last-mentioned bank: so that in effect the whole of the 92,474*l.* 15*s.* 7*d.*, except what was paid to the defendant Thomas Joseph Eyre, was applied for the benefit of the late duke and of Sadleir. In the mean time judgments had been entered up upon the above-mentioned warrants of attorney and on a further warrant of attorney which had been given by the present duke, and which appeared to have extended to the 92,474*l.* 15*s.* 7*d.* On the 11th of August, 1848, John Sadleir executed a declaration of trust of these judgments, by which, after reciting that 134,934*l.* 8*s.* was then due upon them, he declared himself a trustee of them as to 92,474*l.* 15*s.* 7*d.* * for the defendant Thomas Joseph Eyre * 153 and the different members of his family who were interested in that sum, according to the proportions in which they were interested in it, as to 13,500*l.* for the defendant Thomas Joseph Eyre, 5000*l.* part of the money advanced by him having then been repaid, as to 6000*l.* for Willoughby, as to 3000*l.* for the defendant Anthony Norris, as to 7555*l.* 4*s.* 5*d.* for himself, and as to the residue, 12,434*l.* 8*s.* for himself and the defendant Anthony Norris equally.

The mortgage of the Irish estates having as above mentioned failed of effect, other plans were, it appeared, from time to time suggested for securing the moneys which had been advanced to the late duke, but these plans also failed of effect, and ultimately it was agreed between John Sadleir and the present duke, then Marquis of Chandos, in whom all the late duke's estates had then become vested, that a mortgage should be made to Sadleir for securing these moneys. Accordingly, by an indenture dated the 7th of July, 1849, and made between the Marquis of Chandos of the first part, Abraham George Robarts of the second part and John Sadleir of the third part, after reciting the judgments and that 134,934*l.* 8*s.* remained due upon them, the marquis conveyed and assigned several large estates and other property to John Sadleir by way of mortgage for securing the 134,934*l.* 8*s.* which was made up as above mentioned.

Immediately after the execution of this mortgage John Sadleir also executed three several deeds of declaration of trust, dated respectively the 9th of July, 1849, by one of which deeds he declared himself a trustee of the moneys secured by the mortgage,

— for the defendant Thomas Joseph Eyre as to 34,900*l.*

* 154 (being the 13,500*l.* the * amount of his advances to the late duke remaining unpaid, and his share of the 92,474*l.* 15*s.* 7*d.*), and for the several other members of the Eyre family defendants to this suit as to the proportions of the latter sum belonging to them respectively. By another of such deeds he declared himself a trustee of the moneys secured by the mortgage, for Wiloughby as to 600*l.*, being the amount of the moneys advanced by him to the late duke. By the third deed he declared himself a trustee of the moneys secured by the mortgage, for the defendant Anthony Norris as to 9217*l.* 4*s.*, being the 3000*l.* advanced by him to the late duke, and one moiety of the 12,434*l.* 8*s.* 1*d.* to which he and John Sadleir were entitled in equal shares as aforesaid. These declarations of trust were handed to Norris and remained in his possession.

At the time of the execution of the above-mentioned mortgage and declarations of trust John Sadleir was and had for some time been a director and chairman of the board of directors of the London and County Banking Company, on whose behalf the present suit was instituted. He had, it appeared, before the date of the mortgage been in the habit of borrowing large sums of money from the bank, and after the mortgage had been made he and the defendant Norris, who appeared in the first instance to have had the possession of the mortgage deed, several times deposited it with the banking company for securing temporary advances made to them respectively. Ultimately, in the month of April, 1853, it was deposited by John Sadleir with the bank for securing the payment of all bills and notes discounted by the bank for him, and of all advances to be from time to time made by the bank to him. The deed remained thus deposited until the month of August, 1853, when the security was dealt with

* 155 by John Sadleir as follows, * the defendant Anthony Norris acting as his solicitor in the transaction.

By an indenture dated the 8th of August, 1853, Sadleir, in consideration of 134,934*l.* 8*s.* 1*d.* expressed to be paid to him by Hibbert, Barnard, and Barker, assigned to them the mortgage debt of 134,934*l.* 8*s.* 1*d.* and conveyed to them in fee the freeholds comprised in the mortgage, and assigned to them the leaseholds subject to the subsisting equity of redemption.

Although it was expressed in the last-mentioned deed that 134,934*l.* 8*s.* 1*d.* was paid by Hibbert, Barnard, and Baker to Sadleir, the sum of 55,000*l.* only was in fact so paid. By an indenture of the same date made between Sadleir of the one part and Hibbert, Barnard, and Barker of the other part, reciting that the 55,000*l.* only had been paid, but that it was contemplated that Hibbert, Barnard, and Barker might advance the remainder, and reciting an agreement upon the treaty for the payment of the 55,000*l.*, that the entire security should be transferred and that such declaration of trust as thereafter contained should be executed, it was declared that Hibbert, Barnard, and Barker should stand possessed of the security, as to 55,000*l.* and the amount of any sums they might thereafter advance to Sadleir, upon trust for themselves, and as to the residue of the money secured by the mortgage upon trust for Sadleir, his executors, administrators, and assigns, but so that the 55,000*l.* and any sums which Hibbert, Barnard, and Barker might thereafter advance to Sadleir, and the interest thereon, should be a primary charge on the mortgaged premises, so that they might be paid in full before Sadleir could receive any thing from the security.

John Sadleir, for the purpose of carrying into effect * his arrangement with Hibbert, Barnard, and Barker, * 156 obtained the deed of the 7th of July, 1849, from the banking company, by a promise on his part, that he would pay the company the 55,000*l.* to be received by him, and would deposit with them the declaration of trust to be made in his favour, but he did not perform this promise. The bank indeed, appeared to have taken other securities from him, and in the first instance to have declined to accept the declaration of trust as a security, in consequence of an opinion given by Mr. Brodie, that it was not proper for them to accept securities of that nature. Afterwards, however, having been further advised upon the point, they took from Sadleir a security for 10,000*l.*, upon part of the moneys due upon the mortgage. This security was made by an indenture dated the 26th of August, 1854, and after that date the mortgage and the moneys secured by it were thus dealt with by Sadleir. On the 3d of January, 1855, he deposited the declaration of trust of the 8th of August, 1853, with George Barker, for securing to him the sum of 10,000*l.* and interest; and by an indenture of the same date he declared, that Hibbert, Barnard, and Barker should

stand possessed of the 184,934*l.* 8*s.* 1*d.* and interest, upon trust for securing the 10,000*l.* and interest. On the 16th of May, 1855, by a memorandum under his hand, he charged all his interest in the 184,934*l.* 8*s.* 1*d.*, in favour of the banking company, with the balance which for the time being should be due on his banking account to the extent of 60,000*l.*, subject to the charges in favour of Hibbert, Barnard, and Barker and of George Barker for 65,000*l.*; and on the 27th of June, 1855, by an indenture of that date, he assigned to the trustees of the banking company all the mortgage moneys and the mortgaged premises and all his interest in them for securing the sum of 90,000*l.* and interest, subject to the securities of Hibbert, Barnard, and Barker * and of George Barker. Notice of this assignment was given by the banking company to the present Duke of Buckingham, and to Hibbert, Barnard, and Barker, on the 30th of July, 1855.

On the 17th of February, 1856, John Sadleir died, and after his death, on the 2d of April, 1856, the defendant Thomas Joseph Eyre paid to Hibbert, Barnard, and Barker and to George Barker respectively the amounts due and owing to them on their securities, and took an assignment from them of the mortgaged premises and of their mortgaged debts and interest. Willoughby's interest became vested in the defendants Barker and Norris.

The legal estate in the property comprised in the mortgage of July, 1849, had from the commencement of the above transactions been and still remained outstanding, being vested in prior encumbrancers, who had advanced a very large sum on the security of the Buckingham estates.

The case made by the bill, which was filed for the purpose of establishing the priority of the security of the bank over the claims of the defendants, was twofold: first, that the moneys advanced upon the mortgage of the 7th of July, 1849, were the moneys of Sadleir and not of the defendants; and, secondly, that assuming the moneys advanced upon the mortgage to have been the moneys of the defendants, there had been such conduct on their parts as to entitle the plaintiffs to priority over them. In order to establish these points the bill entered at large into the transactions with the late and present Duke of Buckingham and with the bank, and alleged knowledge and concurrence on the part of the defendants, and particularly of the defendant Thomas Joseph Eyre,

* 158 in the * acts and proceedings of Sadleir in the course of

those transactions, from which knowledge and concurrence it ought, as it was contended by the plaintiffs, to be inferred that Sadleir was treated, and was allowed by the defendants to be treated, as the owner of the mortgage. The bill also alleged that the plaintiffs were wholly ignorant that Sadleir was not the sole beneficial owner of the mortgage. And it prayed that the trusts of the declaration of trust of the 8th of August, 1853, might be carried into execution; that Eyre might be declared a trustee of it; that it might be declared that he held the securities upon the trusts of it, regard being had to the assignment made to the trustees of the banking company by the indenture of the 27th of June, 1855; that Eyre might be removed from the trusteeship, and new trustees appointed, of the indenture of the 8th of August, 1853, and for an injunction against dealing with the securities, the plaintiffs offering on behalf of the banking company to pay to Eyre all moneys which he had paid to Hibbert, Barnard, and Barker, and to George Barker, and all costs incurred by him about the transfers from Hibbert, Barnard, and Barker and George Barker to him.

The defendants, except Norris, by their answers denied the knowledge and concurrence imputed to them by the bill. In particular the defendant Thomas Joseph Eyre, who had in these transactions acted on behalf of the other members of his family as well as himself, stated, by his answer, that until after the death of Sadleir he believed that the mortgage had been taken in his own name and was not aware that it had been taken in the name of Sadleir, and had no knowledge of the declarations of trust. The answers also stated a course of conduct on the part of the banking company in their proceedings with Sadleir which ought, the defendants * contended, to disentitle the com- * 159 pany to the priority which they claimed, even if they would otherwise have been entitled to it.

A great mass of evidence was entered into in the cause which, in the opinion of the Court, sufficiently established that the plaintiffs had no actual knowledge that Sadleir was not the beneficial owner of the mortgage, but did not establish any other material fact in addition to those above stated.

The cause was heard before Vice-Chancellor Wood, who dismissed the bill. The plaintiffs now appealed from the order of dismissal.

The Solicitor-General (Sir R. PALMER), *Mr. Rolt*, and *Mr. H. Stevens*, for the plaintiff, in support of the appeal. — The money due on the mortgage to Sadleir never belonged to the Eyres, their money had been paid away for the duke's purposes without security, and there is nothing to connect the Eyres with this mortgage, except the declaration of trust by which Sadleir thought fit to attribute this security to the Eyres' money. But, assuming the money to be theirs, the case stands thus: Eyre places money in the hands of Sadleir, a man having large monetary transactions, to be invested as Sadleir pleases, he makes no inquiry as to Sadleir's proceedings, and Sadleir invests in such a way as to appear to the world the beneficial owner of the money and the securities on which it is invested. Then Eyre, after allowing Sadleir to deal with the funds as he pleased, seeks to overthrow the title of persons who have dealt *bonâ fide* for value with Sadleir on the faith of his apparent ownership. Eyre having given such a general authority to Sadleir must be deemed to have assented to his dealings with the security. Suppose Sadleir had trans-

* 160 ferred the mortgage * and the duke had paid the transferee, can it possibly be contended that Eyre could have called upon him to pay over again? This case is distinct from the common run of those cases where there is a contest between equitable claimants; usually you have a person with a prior equitable title not holding any one else out to the world as owner, and the question is, what amount of negligence is sufficient to postpone him; here Sadleir was allowed to assume an ostensible ownership, which was likely to be used in dealings with third persons. If I allow my money to be invested in the name of another person without taking any precautions against his dealing with it in derogation of my rights, I must be bound by his acts. *Rice v. Rice*, (a) *Perry Herrick v. Attwood*. (b) This case comes within the principle of *Stanhope v. Earl Verney*. (c) It cannot be maintained that, however secret a trust is kept, no alienee for value of the trustee can be safe. Where there is reasonable ground for creating a trust, the Court will support it, but to vest funds in a sole-trustee without taking any precaution is culpable negligence. *Waldron v. Sloper*, (d) is in our favour. *Hewitt v. Loosemore*, (e)

(a) 2 Drew. 73.

(b) 2 De G. & J. 21, 38.

(c) 2 Ed. 81.

(d) 1 Drew. 193.

(e) 9 Hare, 449.

and *Colyer v. Finch*, (a) were cases in which the party whom it was sought to postpone had the legal estate. The exception in *Kennedy v. Green*, (b) from the doctrine of constructive notice does not apply in this case. That case cannot be considered as deciding more than this, that a client has not constructive notice of a fraud which his solicitor commits for his own benefit, it cannot reach the case of the solicitor of a *cestui que trust* knowing that the trustee is committing a breach of trust. Eyre must be taken to have known * through Norris that the * 161 security was made to Sadleir alone, and if he had not in the same way notice that Sadleir was borrowing money upon it for his own purposes, he had at all events such notice as made it his duty to know where the deed was, and to take precautions against an improper use being made of it. That Sadleir was a shareholder in the bank does not affect the bank with notice. *Duncan v. Chamberlayne*, (c) *Thompson v. Speirs*, (d) *Re Hennessy*. (e)

[The Lord Justice KNIGHT BRUCE referred to *Ex parte Boulton, Re Sketchley*. (g)]

This declaration of trust was a mere pocket security. In *Exton v. Scott*, (h) the mortgage was not retained by the mortgagor with the intention of doing any thing inconsistent with it, nor did he do any thing inconsistent with it. Here Sadleir retained the declarations of trust and acted in a way inconsistent with them, showing that he never in fact had completely made himself a trustee. Taking the assignment from Hibbert cannot benefit Eyre. *Saunders v. Dehew*. (i) The plaintiffs have got the mortgage deed and so have the better equity, having obtained it *bonâ fide*.

Mr. Giffard, Mr. Beales, and Mr. Pearson, for the Eyres. — Eyre, having given extensive powers to Sadleir, may be bound by every thing which Sadleir did within the scope of the authority of a trustee, but not by his fraudulent acts. The case is in substance

(a) 5 H. L. Cas. 905.

(b) 3 M. & K. 699.

(c) 11 Sim. 123.

(d) 13 Sim. 469.

(e) 2 Dru. & War. 555.

(g) 1 De G. & J. 163.

(h) 6 Sims. 31.

(i) 2 Vern. 271.

nothing more than the common one of two equitable encumbrancers, the later in date of whom took his security without knowing of the existence of the prior one. There is nothing to show that the mortgage deed was left with *Sadleir, the just inference is that it was left with Norris, and his parting with it in breach of duty cannot give the plaintiff any better equity. Eyre may be effected with notice of what Norris did as his solicitor, but not with notice of acts in which Norris concurred in clear violation of his duty as solicitor and beyond the scope of his authority. The bank had notice that Norris had some interest in the deed and that Sadleir was not sole owner, they were thus put on inquiry and were affected with notice of the prior equities. *Hiern v. Mill.* (a) *Rice v. Rice*, (b) which is cited against us has no application, for there the indorsing on the deed a receipt was a representation to every person to whom the deed was shown that the money had been received. *Waldron v. Sloper* is equally inapplicable; there was laches for a number of years and the deeds were asked for avowedly in order to enable the mortgagor to raise money. The cases on reputed ownership have little to do with the case, they turn upon statutory enactments. In *Taylor v. Great Indian Peninsular Railway Company*, (c) there was great want of caution. There is no need to refer to cases further, the question comes back to *Evans v. Bicknell*, (d) and *Harper v. Faulder*, (e) which show that the mere fact of not having the title-deeds does not postpone a mortgagee; and *Hewitt v. Loosemore* (g) shows that if an inquiry for them is made, a mortgagee will not in the absence of *mala fides* be postponed because he has rested satisfied with a reason which would not have satisfied a prudent man. There is no rule condemning the taking a mortgage in the name of a single trustee, and here, where there were several lenders, it was a convenient and * 163 reasonable course that the security should be taken in the name of one of them only. *Allen v. Knight* (h) is in our favour. [*Eyre v. Burmester*, (i) was also referred to.]

Sir H. M. Cairns and Mr. Walford, for Norris.

(a) 13 Ves. 114.

(b) 2 Drew. 73.

(c) 4 De G. & J. 559.

(d) 6 Ves. 174.

(e) 4 Madd. 129.

(g) 9 Hare, 449.

(h) 5 Hare, 272.

(i) 8 Jur. N. S. 1019.

The Solicitor-General, in reply.

Judgment reserved.

1863. January 27.

THE LORD JUSTICE KNIGHT BRUCE. — The question in this cause is merely between equitable encumbrancers, the London and County Banking Company represented by the plaintiff on one hand, and all or some of the defendants, but especially the defendant Mr. Thomas Joseph Eyre, on the other. And the case is of such a nature that the plaintiff, if he ought to fail wholly against Mr. Thomas Joseph Eyre in the suit, cannot, I think, have any relief under the bill. Mr. Thomas Joseph Eyre's encumbrance is prior in time to any held by the bank. That fact is plain; and therefore *prima facie* and presumptively Mr. Thomas Joseph Eyre is prior to the plaintiff and the bank in point of title and right. The plaintiff however insists that there has been conduct on the part of Mr. Thomas Joseph Eyre sufficient to render the postponement of him to the plaintiff, that is, to the banking company, just. I see, however, no evidence of any such conduct, I see no license, no behaviour equivalent to a license, from Mr. Thomas Joseph Eyre to Mr. Sadleir to deal in the manner that he dealt, so as to defeat, postpone or prejudice the Eyre security. I see no case of fraud on the part of Mr. Thomas Joseph Eyre, no case of collusion between him * and Mr. Sadleir, or of laches * 164 on Mr. Thomas Joseph Eyre's part, or acquiescence by him in Sadleir's fraudulent proceedings. The present controversy may possibly seem, and indeed be, complicated, but when the materials are unravelled the dismissal of the bill appears to me clearly right. Perhaps the connection which existed between Sadleir and the banking company is of itself fatal to the suit. But upon that point I think it unnecessary to give an opinion. It has been argued for the defendant Mr. Norris that the bill should have been dismissed against him not without, but with costs. I think, however, that the Vice-Chancellor's order is right in all respects. Nor do I mean to impeach Mr. Norris's integrity when I say that his connection, with a portion at least of the conduct and circumstances in evidence, was such in my opinion as to preclude any claim on his part to costs. This remark applies, however, only to the costs refused to Mr. Norris by the Vice-Chancellor Woon.

It appears to me that all the respondents should have their costs of the appeal against the appellant.

The Lord Justice TURNER, after stating the facts of the case in nearly the same terms as they are stated above, proceeded as follows:—

As to the first point raised by this bill and which was insisted upon by the plaintiffs in support of this appeal, that the moneys advanced upon the mortgage of the 7th of July, 1849, were not the moneys of the defendants or any of them, it was stated, in the course of the argument on the part of the appellants, that the Vice-Chancellor disposed of the point upon the ground that the plaintiffs in the 66th paragraph of the bill had admitted that the mortgage was made to Sadleir as a trustee for the

* 165 * parties interested in the mortgage money, but it was contended that it was nevertheless open to the plaintiffs to show that the moneys lent upon the mortgage were not the moneys of the defendants. It does not seem to me however that, even assuming this to be the case, the effect of the allegation in the 66th paragraph of the bill would be at all altered. In whatever mode these moneys were procured Sadleir might, if he thought fit, make himself trustee of the mortgage, and the plaintiffs having alleged that he had done so I agree with the Vice-Chancellor that for all the purposes of this suit he must be taken to have been trustee. In truth, however, upon examining the case, I think that he was, at least so far as the Eyres and Willoughby were concerned, in every sense a trustee of the mortgage; for as to the sums of 13,500*l.* and 6000*l.*, which formed part of the mortgage moneys, those sums had been lent to the duke himself, and the securities for them had been taken in the name of Sadleir, and as to the 92,474*l.* Sadleir was one of the trustees who held those moneys for the purpose of investment on the then intended Irish mortgage, and held them under the agreement of the 17th of January, 1847; and the trust which, by that agreement, attached upon those moneys would, as I apprehend, attach upon the mortgage, and not the less because those moneys had been improperly dealt with by Sadleir and the other persons in whose names they had been deposited. Besides, these moneys were, if I rightly understand the case, secured by one at least of the judgments,

and it was not even attempted to be argued that the moneys due upon the judgments ought not to be followed into the mortgage. It was urged on this part of the case, that some part of these moneys had been applied in payment of the mortgage which the defendant Thomas Joseph Eyre held upon estates of the late duke, and which had no connection with these transactions, but the evidence * does not satisfy my mind that the defendant * 166 Thomas Joseph Eyre knew the source from which the moneys applied in payment of the last-mentioned mortgage were derived, and even if he did, that fact is not, I think, material, for the whole of the 92,474*l.* was afterwards treated as remaining due, and to be secured by the mortgage in question. I think, therefore, this first point may be laid out of the case.

If, then the case rested here, there would at all events be a constructive trust in Sadleir, but, independent of any question of constructive trust, there are here express declarations of trust by Sadleir. It was said that these express declarations of trust were pocket instruments, and ought not to be considered as at all affecting the case, but if weight could under any circumstances be given to that argument, which, having regard to the case of *Exton v. Scott*, (a) I very much doubt, that weight seems to me to be wholly displaced when it is shown that the declarations of trust were, as in this case they were and were agreed to be, part and parcel of the original security. So far as these declarations of trust are concerned, it is not, as I conceive, material whether the *cestuis que trust* actually knew of their existence or not, except so far as their knowledge or ignorance upon the point may affect the opinion to be formed upon their conduct, for whether they knew of the declarations of trust or not, the trust would subsist, and it cannot be said that they are not entitled to the benefit of them, when they were part of their original security, for I agree with the Vice-Chancellor in considering that, at all events so far as the Eyres were concerned, they were bound by the mortgage being taken in the name of Sadleir. They had, as it seems to me, through the medium * of Thomas Joseph Eyre, who * 167 acted for them all in the business, placed themselves in the hands of the defendant Anthony Norris as to the mode of investment, and it was, I think, within the scope of Norris's authority to take the investment in the name of Sadleir, but I think the

(a) 6 Sim. 631.

investment must be looked at with reference to the whole transaction and not to part of it only, and upon the whole transaction the investment was in the name of Sadleir, with a declaration of trust by him. The true position of this case, therefore, is, that the plaintiffs are claiming priority over *cestuis que trust* under a breach of trust committed by their trustee, and it is in this point of view we have to consider the second question raised by this bill, whether there has been such conduct on the part of the defendants as to entitle the plaintiffs to priority over them.

Questions of priority between equitable encumbrancers (and the encumbrances both of the plaintiffs and of the defendants in this case are equitable, the legal estate being, as has been stated, outstanding) are in general governed by the rule "*qui prior est tempore potior est jure*,"¹ and in determining cases depending on the rule we must of course look at the principle on which the rule is founded. It is founded, as I conceive, on this principle, that the creation or declaration of a trust vests an estate and interest in the subject-matter of the trust in the person in whose favour the trust is created or declared. Where, therefore it is sought, as in the present case, to postpone an equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it.² A vested estate or interest ought not to be disturbed

upon any light grounds. The case which is here alleged,
 * 168 and which was insisted * upon at the bar against the defendants, the Eyres, whose case I propose first to consider, is this, that the defendant Thomas Joseph Eyre, acting for himself and for the other members of his family who are defendants to this bill, trusted every thing to Sadleir, permitted him to deal with the mortgage, and the moneys secured by it, as he thought fit, and created and recognized an apparent ownership in him, and that they ought not, therefore, to be allowed to claim against third parties who dealt with him *bona fide* upon the faith of his apparent title; but I do not find any proof whatever that the defendants the Eyres, or any of them, were in any way privy to or cognizant

¹ See Kerr F. & M. (1st Am. ed.) 321; *Case v. James*, 3 De G., J. & S. 256, 264; *Newton v. Newton*, L. R. 6 Eq. 135.

² See Lewin Trusts (5th Eng. ed.), 507, 508; *Adams's Eq.* (5th Am. ed.) [148], 306.

of any of the dealings of Sadleir with the mortgage in question, or the moneys secured by it. It was indeed faintly argued, that they ought to be held bound by the acts and conduct of the defendant Anthony Norris, their solicitor, but I do not find that they or any of them in any way authorized or sanctioned those acts or that conduct, and I do not apprehend that a solicitor can without express authority, or at all events without authority to be implied from circumstances furnishing the most substantial grounds for the implication, either pledge his client's deeds, or do any act which can prejudice or affect his estate or interest under them. It would be of most dangerous consequence to hold that solicitors have any such power. The case of *Hunt v. Elmes* (a) is not without its bearing on this point.

It was then said, however, that knowledge ought to be imputed to the Eyres, that Sadleir stood in the position of a trustee for them, and that there was such culpable negligence on their part that they ought to be postponed to the plaintiffs. In the state of the evidence before us * it is not, I think, easy to * 169 determine whether the defendants the Eyres had actual notice that Sadleir was their trustee, but I am not disposed to differ from the Vice-Chancellor's view, that this knowledge ought to be imputed to them. I agree the more readily in this view, because it is as it seems to me the view most favourable to the plaintiffs, for one part of the negligence imputed to the Eyres is, that they made no inquiries into the acts or conduct of Sadleir, and unless they knew him to be a trustee for them they could not of course be bound to make any such inquiries. Assuming, however, that they had this knowledge, were they bound to make these inquiries? I think not. The very first principle of trusts is, that the *cestui que trust* places confidence in his trustee, and if it is to be held that a *cestui que trust* is to be postponed upon the mere ground that he did not inquire into the acts or conduct of his trustee, that principle would, as it seems to me, be in a great measure, if not wholly, destroyed. Another part of the negligence imputed to the Eyres is, that they did not ascertain to whom the mortgage was made, in whom it was vested, or in whose possession it was; but to hold that they ought to be postponed on this ground would be to lay it down, that no one is justified in trusting his own

(a) 2 De G., F. & J. 578.

solicitor.¹ It was attempted on the part of the appellants to make some distinction in this case, upon the ground that the mortgage is what is called a contributory mortgage, a mortgage in which several persons are beneficially interested, but I see no distinction which can be made upon this ground. The number of the *cestuis que trust* cannot alter the relation in which the trustee stands towards them. Lastly, it was said that to decide this case in favour of the defendants would be to hold that money could in no case safely be lent upon a mere equitable security; but this observation, although striking, is not new, and if equitable securities are to be made perfectly safe, it must be done by the legislature. We cannot alter the law.

It was further contended on the part of the appellants that they were entitled to priority upon the ground that they got possession of the mortgage deed when they made their advances, and *Stanhope v. Lord Verney*, (a) was relied on in support of this view: but in this case the plaintiffs got possession of the mortgage deed by the wrongful Acts of the trustee of the defendants, and it is not, as I conceive, the doctrine of this Court, that in the case of mere equitable interests, priority can be obtained through the medium of a breach of trust or duty.¹ The case of *Stanhope v. Lord Verney* is plainly distinguishable. There was in that case no declaration of trust of the term in favour of the first encumbrancer, and it is I think evident from the judgment that if there had been any such declaration of trust the decision would have been the other way. The appellants relied also upon *Waldron v. Sloper*, (b) *Rice v. Rice*, (c) and *Perry Herrick v. Attwood*, (d) but the case of *Waldron v. Sloper* differs so materially in its circumstances from the present case that it is unnecessary to give any opinion upon it; and as to the other cases, in *Rice v. Rice* the party claiming the prior equity had executed a deed in which he had acknowledged to have received the amount which he claimed; and in *Perry Herrick v. Attwood* (d) the prior encumbrancer had parted with the deeds for the purpose of enabling a further encumbrance to be made. Those cases, therefore, are wide of the present, which seems to me to be much more nearly ruled by my

(a) 2 Ed. 81.

(c) 2 Drew. 73.

(b) 1 Drew. 193.

(d) 2 De G. & J. 21.

¹ See Kerr F. & M. (1st Am. ed.) 142.

learned brother's decision in *Manningford v. Toleman*. (a) For * these reasons my opinion is, that the plaintiff's case * 171 fails, on the second point also, as against the defendants the Eyres, and certainly it does not fail the less as against Willoughby.

A third point was raised on the part of the appellants that the residue of the money due upon the mortgage, after satisfying Hibbert, Barnard, and Barker, and George Barker, ought to be apportioned between the defendants the Eyres, the defendants Norris and Bowker as assignees of Willoughby, the defendant Norris in respect of the moneys advanced by him, and the same defendant as the personal representative of the late John Sadleir, and that what should be apportioned to the defendant Norris in his own right and as representative of Sadleir ought to be paid to the plaintiffs; but the claim of the plaintiffs in this respect is founded upon the rights of Sadleir and Norris, and the conduct of both those parties has been such that they could not, in my opinion, have been permitted to set up any claim as against the Eyres and Willoughby. The plaintiffs, therefore, fail equally upon this point.

There remains then only the question as to Norris's costs, as to which I have no doubt. He has in truth been in no inconsiderable degree the author of the mischief, not to the defendants only but to the plaintiffs also, and cannot, therefore, be entitled to costs. The result, therefore, is, that the plaintiffs' case having wholly failed, the bill was properly dismissed, and of course no adjudication could be made on any equity which there may have been or may be between the defendants the Eyres and the assignees of Willoughby. The appeal must consequently be dismissed, and I think with costs.

(a) 1 Coll. 670.

[181]

* 172 * In the Matter of THE JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848, 1849,
AND
In the Matter of THE ERA LIFE and FIRE ASSURANCE
COMPANY.

1863. January 31. Before the LORDS JUSTICES.

A motion to have a claim for a large debt allowed against a company in course of being wound up having been successfully made, the Vice-Chancellor declined to certify that the case was a proper case for the appearance of the creditors' representative by counsel, and on appeal a motion to have the costs of his appearing by counsel allowed was refused.

Per the Lord Justice TURNER. As a general rule, the creditors' representative ought not to appear on applications in which the contributories and creditors have a common interest, where the interest of the contributories is as great as that of the creditors.

THIS was an application by the creditors' representative to vary two orders of Vice-Chancellor WOOD, so far as related to his costs.

An order having been made on the 29th of May, 1858, for winding up the Era Assurance Company, claims were made in Chambers by the trustees of the Anchor Life and Fire Insurance Company, and by W. E. Williams, to prove as creditors of the Era Company. The hearing of these claims was adjourned into Court, and the claims were disallowed. (a) Subsequently, in consequence of the decision of the Lords Justices in the *Era Company's Case*, (b) the claimants served notices of motion to rehear the claims, the creditors' representative being served in each case. On the 12th of December, 1862, the motions were heard before Vice-Chancellor WOOD, who made, on the motion of the trustees of the Anchor Society, an order that they should be at liberty to go before the Judge in Chambers and prove for the amount of their debt against the Era Company. The official manager was ordered to pay the trustees of the Anchor Company their taxed costs of the motion, "and it is ordered, that the costs of the creditors' representative and of the official manager of this appli-

(a) 2 Johns. & H. 400.

(b) *Supra*, p. 29.

cation be taxed by the taxing master, but the Judge * declines to certify that it is a proper case for the appearance of the said creditors' representative by counsel." It was further ordered, that the costs of the creditors' representative and the official manager when taxed, and the costs of the trustees of the Anchor Company, when paid by the official manager, should be allowed out of the estate of the Era. A precisely similar order was made on the motion of Williams. * 173

The creditors' representative now moved to vary these orders, and to obtain an allowance of his costs of appearing by counsel.

Mr. Willcock and *Mr. Roxburgh*, for the appellant. — Under the Winding-up Act of 1848, as soon as an official manager had been appointed, a creditor was not at liberty to commence proceedings at law until he had proved his debt before the Master; but this was the only check imposed upon him, his legal remedies were therefore not substantially interfered with. But the Statute 20 & 21 Vict. c. 78, places matters on a very different footing, for under it a creditor is restrained from suing at law, except under certain strict conditions. His legal rights, therefore, are materially interfered with. The Act, therefore, to prevent injustice being done to the creditors, provides for the appointment of a representative to watch over their interests, thus giving them a power, which they had not before, of intervening in the winding-up proceedings. The Act expressly provides, that the representative is to have all reasonable costs. His costs properly incurred in attending on any application which materially affects the interests of the creditors must surely be considered reasonable costs. It has been decided by the Court of Appeal, that he is entitled to his costs of appearing on settling the list of contributories: * *In re Mexican and South American Mining Company*; (a) and the resisting a large claim of debt, like that in the present case, is a matter in which the creditors are as much interested as in settling the list of contributories. In *Cottrell's Case*, (b) he was only allowed 5*l.* 5*s.*, but there he was not an appellant, and had not been served with the appeal. This, moreover, was not a case in Chambers; the Vice-Chancellor had, no doubt, jurisdiction to refuse costs altogether, but we submit, that declining to certify the case to

(a) 6 Weekly Rep. 560.

(b) 11 Weekly Rep. 13.

be a proper case for appearing by counsel, was irregular, the creditors' representative could not otherwise appear at all, unless he came in person. The present appeal is brought, mainly, with the view of obtaining a decision which shall be some guide as to attendance of the creditors' representative.

Mr. Reilly, for the official manager, left the case in the hands of the Court.

THE LORD JUSTICE KNIGHT BRUCE.— Upon an application before the Vice-Chancellor Sir WILLIAM P. WOOD, the matters in dispute having been discussed on several previous occasions, and the creditors' representative and the official manager having the same interest, the Vice-Chancellor considered that, although the general costs of the creditors' representative should be allowed, there was no reason why the expense of his attending by counsel on that particular application should be allowed. It is for those who contend that the discretion of the Vice-Chancellor was erroneously exercised to show that such was the case. This, in my judgment, has not been done; on the contrary, my impression is, that the Vice-Chancellor has properly exercised his discretion.

* 175 * THE LORD JUSTICE TURNER.— I am not sorry that this case has been brought here, since it is important that some general rule should be established as to the costs of the appearance of the creditors' representative. Great expense is caused by the operation of the Statute 20 & 21 Vict. c. 78, which makes it necessary to serve two parties, the official manager and the creditors' representative, with notice of all proceedings. At the same time, such an enactment as that providing for the appointment of a creditors' representative was necessary for the protection of the creditors, who, by this statute, are deprived of the right (which they retained under the old winding-up Acts) of proceeding at law, a right by the exercise of which the estate used to be put to very great expense. It is our duty, so far as we can, to lay down some general rule to be applied to cases of this description, in order to prevent the useless expense which would be occasioned by the appearance, on every occasion, of the creditors' representative on behalf of the creditors, in addition to the appearance of the official manager on behalf of the contributories. It is, of course, impossi-

ble to lay down a rule applicable to all cases and all circumstances ; but as a general rule, I think that upon any question in which the creditors and the contributories have a common interest, and the contributories are as much interested as the creditors, the creditors' representative ought not to appear, but should leave the case in the hands of the official manager. When, on the other hand, any question arises between the creditors and the contributories, then the application is properly attended both by the creditors' representative and the official manager, one representing the creditors and the other the contributories. On the question raised by the application to the costs of which the present appeal relates, it is perfectly clear that the contributories had a common interest, and * at least an equal interest, with the creditors, in * 176 fact, they had a greater interest than the creditors in resisting the application, for if they had succeeded in defeating it, they might have had some chance of not only escaping liability to contribute but of getting something out of the estate. I think, therefore, that the application was not one upon which there was any occasion for the creditors' representative to appear. We have, indeed, decided that the creditors' representative is entitled to his costs of attending the settling of the list of contributories, in which the creditors, and the official manager as representing the contributories already on the list, have a common interest. But there is a broad distinction between that case and a case like the present. In settling the list of contributories, the contributories already on the list, who are represented by the official manager, have a very limited interest, since their object is only to get on the list persons who are liable to contribute with them ; but the creditors' representative has a greater interest, as by getting additional persons put on the list he makes those persons liable to pay the debts due to the creditors, and so materially increases their security. I think that in the present case the weight of interest was with the contributories, and that the creditors' representative ought, therefore, to have left the matter in the hands of the official manager. But I think that the question was properly brought before this Court, as it was important that a general rule should be laid down, and the motion will, therefore, be refused without costs.

1863. January 15, 16, 23. Before the Lord Chancellor Lord WESTBURY.

The words in a will "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property situate in the parish of M.," held to be an effectual gift to N., who was in fact neither heir nor next of kin of the testator.

THIS was an appeal from the decision of Vice-Chancellor STUART allowing a demurrer to the whole bill with leave to amend.

The bill, so far as it is material to be stated, alleged in substance as follows:—

That Samuel Newns by his will, dated the 3d of December, 1832, devised to and to the use of his trustees, their heirs and assigns, certain real estate in or adjoining to Lloyd Street, in Chorlton-upon-Medlock, upon trusts for his wife for life, and after the death of his wife in moieties for his brother John and his children, and his brother William and his children.

That the testator's brothers, John and William, died in the testator's lifetime, the former without issue, and the latter leaving the plaintiffs Bertha Parker, Isabella Edwards, and Enoch Newns, his children him surviving, of whom Enoch Newns was the testator's heir-at-law. The testator died in the year 1845, and his wife, who survived him, in January, 1857.

That the plaintiffs never heard of any revocation by the testator of his will; but that on the 18th of July, 1861, the defendant Thomas Nickson obtained probate of the will and of a codicil, which was as follows:—

"I Samuel Newns, of Greenhays, in the parish of Manchester, in the county of Lancashire, acknowledge Thomas Nickson, my second cousin, shopkeeper, No. 21 Chester Street, Chorlton-upon-Medlock in the parish * of Manchester, in the county of Lancashire, to be my next of kin and heir-at-law to all my real and personal property situate in the parish of Manchester in the county of Lancashire. If my wife survives me, in two years after my wife's death my second cousin Thomas Nickson and next of kin to take possession of all my real and personal

property, and to pay all my just debts according to my will. Thomas Nickson, my second cousin, his [*sic*] my next of kin and heir-at-law, as my brother John is dead and has left no issue. The reason I give Thomas Nickson this written document is I am afraid [*sic*] my executors will not put my will into Court, as they wanted me to burn my will. Executed this 3d day of February in the year of our Lord 1848.

“ The mark × of
“ SAMUEL NEWNS.

“ Witnesses — SAMUEL ANKERS,
“ JOHN JONES.”

The bill stated that the allegation made by the codicil, that the defendant Thomas Nickson was the heir-at-law and next of kin of the testator, was without foundation, and sought a declaration of the rights of all parties in the testator's real estate, and an injunction to restrain the defendant from selling it.

The demurrer was allowed on the ground, that, upon the allegations in the bill, irrespectively of the question of the construction of the codicil, the plaintiff's title to sue was not sufficiently made out.

Mr. Malins and *Mr. Bird*, for the appellants. — There is no express devise in this codicil to Thomas Nickson, the words of acknowledgment of his heirship — words less strong, indeed, than words of declaration * would have been, but simply * 179 having reference to his relationship to the testator — being insufficient to constitute him devisee. *Jackson v. Craig.* (a) Neither is there any devise by implication. *Adams v. Adams.* (b) But, even assuming that a devise was contained in these words, it was a devise made to Thomas Nickson, under a particular character, viz., that of the testator's next of kin and heir-at-law, which he did not fill; and is, consequently, within the principle laid down in *Kennell v. Abbott.* (c) If not, it still must fail, on the ground that, being inconsistent with the dispositions of the will, and, so far as it goes, a revocation of them, it was a revocation made, as clearly appears from the conclusion of the codicil, under the mistaken belief that the testator's brothers, John and William,

(a) 15 Jur. 811.

(b) 1 Hare, 537.

(c) 4 Ves. 802.

were each dead, without issue. *Campbell v. French*, (a) *Doe d. Evans v. Evans*. (b)

Mr. Karlake, for the respondent, Thomas Nickson. — Upon the statement of facts appearing upon the face of this bill, the intention of the testator to put Thomas Nickson in the position of his devisee and universal legatee is sufficiently indicated; and that being so, the language in which that intention is expressed is not to be regarded. *Sheppard's Touchstone*. (c) But, in fact, the language used is not inapt. The corresponding expressions of the Roman law were, "Titium hæredem facio ex asse, ex semisse," and the like: and in the older English conveyancing forms, we find devises in such form as "I permit my estate to descend to my heir,"

without the formality of saying, "I make him my heir,"
 *180 *and give my estate to him." *Jackson v. Craig* was perfectly different to the present case, as was, also, *Adams v. Adams*. It is said, however, that even assuming the intention to be sufficiently indicated, the testator created Thomas Nickson such devisee and legatee under a misapprehension of his real situation. But misapprehension alone, in such a case, is not sufficient to avoid the devise. In all cases, in order to bring about that result, there must be — what is wholly absent here — a false assumption by the devisee of a particular character, which alone can be supposed the motive of the testator's bounty: *Kennell v. Abbott*, (d) *Giles v. Giles*, (e) *Rishton v. Cobb*; (g) and if that is absent, the devise will not be invalidated by mere misdescription, either of its objects: *Schloss v. Stiebel*, (h) *Doe d. Gains v. Rouse*, (i) *Pratt v. Mathew*; (k) or of its subjects: *Longstaff v. Rennison*. (l) But it is said, lastly, upon the authority of *Campbell v. French*, and *Doe d. Evans v. Evans*, that the codicil is a revocation of the dispositions made by the will, and void, because made under a mistaken impression. But there is nothing to show that when the testator made this codicil, he was under the belief that his brother William was dead without issue.

(a) 3 Ves. 321.

(b) 10 Ad. & El. 228.

(c) Page 416.

(d) 4 Ves. 802.

(e) 1 Keen, 685.

(g) 9 Sim. 615; 5 Myl. & C. 145.

(h) 6 Sim. 1.

(i) 5 C. B. 422.

(k) 22 Beav. 328.

(l) 1 Drew. 28.

Mr. Bird, in reply, referred to or commented on *Doe d. Hickman v. Haslewood*, (a) and *Doe d. Pratt v. Pratt* (b) and also *Tilly v. Collyer*, (c) and *Tayler v. Web*, (d) cited in Jarman on Wills. (e)

Judgment reserved.

November 18.

* THE LORD CHANCELLOR. — The plaintiffs' title is derived * 181 under the will of one Samuel Newns, dated in the year 1832.

The defendant's title rests upon the codicil to that will, dated in the year 1843.

Under the will, the plaintiffs claim to be entitled to certain plots of land and messuages of the testator, situate in Chorlton-upon-Medlock, which, as I collect from the bill, is within the parish of Manchester. The defendant alleges that in the first sentence of the codicil there is a specific devise of the whole of this property to him, the defendant Nickson, in fee-simple; and, therefore, a revocation of the devise in the will. In the Court below the judgment was not founded on the construction of the codicil, which is really the true subject for decision; but upon the sufficiency of the allegations in the bill, and the Vice-Chancellor, allowing the demurrer, gave leave to amend. As I cannot upon this petition discharge the leave so given, and it is possible that the construction of the codicil may, in some respects, be affected by more accurate statements, as to the locality of the property, I shall decide upon the construction of the codicil, without prejudice to any question that may hereafter arise upon an amended bill.

The first part of the codicil is in these words:—

"I, Samuel Newns, acknowledge Thomas Nickson, my second cousin, shopkeeper, No. 21, Chester Street, Chorlton-upon-Medlock, in the parish of Manchester, to be my next of kin, and heir-at-law to all my real and personal property, situate in the parish of Manchester;" and I am of opinion that these words con-

(a) 6 Ad. & El. 167.

(c) 3 Keble, 589.

(b) 6 Ad. & El. 180.

(d) Style, 301, 307, 319; S. C. *nom.* *Marret v. Sly*, 2 Siderfin, 75.

(e) Vol. 1, p. 331, note (d), 494, 495 (3d ed.).

stitute a good devise to Thomas Nickson in fee-simple of
 * 182 all the testator's *lands in the parish of Manchester.

Nothing is better settled in our law than that the words, "I make A. B. my heir," or, "I declare A. B. to be my heir," or even the words "A. B. is my heir," amount to a devise to A. B. in fee of all the inheritable lands of the testator.

Thus in *Taylor v. Web*, (a) the words were, "I do make my cousin, Giles Bridges, my sole heir and my executor;" and it was said by the Lord Chief Justice ROLLE, "We may collect the testator's meaning to be, by making of the party his heir, that he should have his lands, and it is all one as if he had said, heir of his lands;" and Justice JERMAN said "the word 'heir' implies two things: 1, that he shall have the lands; 2, that he shall have them in fee-simple."

In Mr. Powell's work on Devises, (b) it is said, and I think correctly, "If one claim under the description of heir, he must show that he is heir in that sense in which the testator has used the term. Now, an heir may be in four ways: first, heir with relation to the ancestor of the person so described, as heir general; secondly, heir by particular description of the testator, as heir special; thirdly, heir with relation to property, or to the thing to be inherited; fourthly, heir by inference." And, on the second head a reference is made, although not very correctly, to the language of the Lord Chief Justice HOBART, in the case of *Couden v. Clerke*, (c) in the following terms: "If one devise in these words, 'I give to my heir male, who is my brother A. B.,' this will be a good devise, although the testator have a son who is heir general."

In *Spark v. Purnell*, (d) it is said, "though none can
 * 183 * be truly heir but he that the law makes so, yet there is an heir by appellation and vulgar acceptance, which intimates the state of a true heir; and therefore, if by my will I appoint that J. S. shall be heir of my land, he shall have it in fee: for such estate as the ancestor hath, such he is to inherit."

It was contended for the plaintiffs, that the word "acknowledge" was not sufficient to constitute a devisee, and that it indicated an intention only to recognize a degree of relationship.

(a) Style, 301, 307, 319.

(b) Vol. 1. pp. 309, 313, ed. by Jarman.

(c) Hobart, 29, 34.

(d) Hobart, 75.

But the answer is, that he is acknowledged to be "next of kin and heir-at-law to all the testator's real and personal property in the parish of Manchester," which words plainly show that he is named heir and next of kin, not with relation to the testator personally, but with reference to the property to be taken and enjoyed; and this is put beyond doubt by the subsequent part of the will.

Neither is the word "acknowledge" an insufficient expression. It is enough to indicate an intention that the person named shall be recognized as filling that character which would entitle him by law to the whole of the real estate.

In the civil law, before the Codes, a particular form of words was required for the institution of an heir, but by the 6th Book of the Codes, tit. 23, § 15, entitled "*De Solemnitate Verborum Sublata*," this necessity is taken away, and it is said, "*quibuslibet confecta sententiis vel in quolibet loquendi genere formata, institutio valeat, si modo per eam liquebit voluntatis intentio.*" And this certainly is the rule of English law.

But it was then insisted that the concluding words of the codicil, "Thomas Nickson, my second cousin, is my * next * 184 of kin and heir-at-law, as my brother John is dead and has left no issue," must be taken as meaning not merely what is expressed and which was true, viz., that John was dead without issue, but also as proving that the testator believed William had died without issue, which was not true, and consequently that the devise to Thomas Nickson was founded on an erroneous supposition, and therefore failed. It is scarcely necessary to observe that no such inference can be derived from the words. The death of John without issue might have been a very sufficient reason with the testator for making Thomas Nickson his general devisee, to the exclusion of the plaintiffs claiming to be issue of William. I cannot presume that he made the codicil under the belief that his brother William was dead without issue unless he had told me so.

My opinion is, that all the testator's real estate in the parish of Manchester (which on this bill must be taken to include the lands and messuages claimed by the plaintiffs) is well devised to Thomas Nickson in fee, and that this demurrer ought to be allowed.

1863. January 13, 28. Before the Lord Chancellor Lord WESTBURY.

If A. has acquired property in a trade-mark, which is afterwards used by B. in ignorance of A.'s right, A. is entitled to an injunction,¹ but not to an account or compensation, except in respect of any user by B. after he became aware of the prior ownership.

The owner of a trade-mark will not be deprived of remedy in equity, even if it be shown that all who bought goods bearing the mark from the defendant were well aware that the goods were not of the plaintiff's manufacture. It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market, nor is it necessary to show that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other.²

Where the plaintiff attached to wire manufactured by him tallies marked with an anchor, and the defendant attached to his manufacture similar tallies marked with the device of a crown and anchor: *Held*, that the plaintiff was entitled to an injunction.

Negotiations antecedent to a suit (save in a case of bad faith), unless amounting to a release or binding agreement, cannot be regarded.

THIS was an appeal from a decree of Vice-Chancellor WOOD, directing an account, and awarding a perpetual injunction in the terms of the prayer of the plaintiff's bill, which was filed against the defendants for infringement of the plaintiff's trade-mark.

The case made by the bill was as follows:—

The plaintiff had for upwards of 19 years carried on the business of a wire manufacturer, at Warrington, and having formerly, and until the death of Mr. Price, carried on the business in partnership with him, under the firm of Edelsten & Price, he had since the

¹ See *Dixon v. Fawcus*, 3 El. & El. 537; *Kerr Inj.* 488, 489; *Bradley v. Norton*, 33 Conn. 157; *Dale v. Smithson*, 12 Abb. Pr. 237; *Coffeen v. Brunton*, 4 McLean, 517; *Coates v. Holbrook*, 2 Sandf. Ch. 586; *Messerole v. Tynberg*, 36 How. Pr. 14; *Burgess v. Hills*, 26 Beav. 244.

² See *Burgess v. Burgess*, 3 De G., M. & G. 896, note (1), and cases cited; *Farina v. Silverlock*, 6 De G., M. & G. 214, note (2), 217, note (2); *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. (S. C.) 599; *Candee v. Deere*, Sup. Ct. Ill. 10 Law Reg. (N. S.) 694, 707, 708, in note; 2 Dan. Ch. Pr. (4th Am. ed.) 1648, 1649, and cases in notes (2) and (3); *Adams's Eq.* (5th Am. ed.) [217], 427, and cases in note (1); *Kerr Inj.* 474 *et seq.*; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 528; *Bradley v. Norton*, 33 Conn. 157; *Walton v. Crowley*, 3 Blatchf. C. C. 440.

death of Price continued to carry on the business on his own account under the same firm.

Previously to the year 1852 the plaintiff used no peculiar device as a trade-mark ; but in the month of September in that year, in order to distinguish the goods manufactured by him from the goods of other manufacturers, he adopted the device of an anchor as his trade-mark, * and had since that time constantly used * 186 such trade-mark on his circulars, bill-heads and letters, and had had the same stamped upon the metal labels (known in trade as "tallies") attached to each bundle of wire of a certain quality, as sent out from the manufactory.

In consequence of such trade-mark the wire of the quality denoted by it, and manufactured by the plaintiff, became known in the trade as the "anchor-brand wire," and from its superiority of manufacture and excellence of quality it had attained a high reputation ; and the "anchor-brand wire" was greatly inquired after and sought for by purchasers of such goods in all parts of the world, and the same was more generally and readily sold at a higher price than wire not bearing that brand or mark.

The trade-mark in question accordingly became well known ; so much so that in 1857 a manufacturer of tallies, at Birmingham, wrote to the plaintiff and informed him that he had an order for tallies, with an anchor stamped on them ; but that he believed the anchor to be the trade-mark of the plaintiff, and he asked for information on that point, that he might not do wrong.

The plaintiff, in reply to this application, claimed the anchor as his trade-mark.

The plaintiff had for several years past been aware that his trade-mark was extensively pirated by other wire manufacturers ; but he had until shortly before the institution of the suit, been unable to ascertain by whom in particular the trade-mark had been used.

In May, 1861, a person, at Liverpool, wrote to him * offer- * 187 ing for sale a large quantity of wire, which it subsequently appeared was part of a quantity of twenty casks which had been saved from the wreck of the Versailles ; and, in reply to an inquiry of the plaintiff, his correspondent informed him that he believed the wire was the plaintiff's own manufacture, as the tallies attached to it were stamped with the same trade-mark as that at the head of the plaintiff's letter.

The plaintiff, having reason to believe that such wire was not his manufacture, purchased it chiefly for the purpose of tracing by whom it had been manufactured; and accordingly finding that the trade-mark on the same was not his, but a colourable imitation of it, he endeavoured to ascertain from the shipping agent who had shipped the wire, and from the London and North-Western Railway Company, who had conveyed it to Liverpool, by whom it had been manufactured, but all information was refused him.

The plaintiff was occupied for some time in endeavouring to trace the wire saved from the Versailles, but having failed to do so, and having reason to suspect that it had been manufactured by the defendants who were wire manufacturers at Birmingham, trading under the firm of Edelsten, Williams & Edelsten, he immediately, on failing to trace it, directed one of his travellers to order some "anchor-brand wire" from the defendants. An order given accordingly by a letter of the 11th of June, 1861, was executed by the defendants sending to the plaintiff's traveller the wire so ordered, which came to hand on the 22d of the same month, with tallies attached thereto stamped with an anchor and also a small crown at the top of the anchor, such tallies being very similar to the plaintiff's and exactly like the tallies

*188 saved from the wreck of the Versailles * and the mark thereon being, as the plaintiff submitted and believed, only colourably differing from his own trade-mark, and intended to mislead purchasers of wire, and to induce them to believe that, when purchasing the wire manufactured by the defendants they were purchasing the "anchor-brand wire" manufactured by the plaintiff.

The plaintiff upon ascertaining that the defendants were in the habit of using a trade-mark in imitation of or only colourably differing from his own, consulted his legal advisers, and considerable correspondence resulted between them and the legal advisers of the defendants.

The bill charged that the defendants well knew that the sale of wire (especially of such as was intended for the foreign market) was promoted, and a higher price realized for it by the plaintiff's trade-mark or a trade-mark in imitation thereof, or only colourably differing therefrom, being stamped or impressed upon the tallies attached thereto, whereby the purchasers were led to believe that such wire was "anchor-brand wire" manufactured by the plain-

tiff; and that the defendants accordingly procured the tallies with a trade-mark in imitation of the plaintiff's or only colourably differing therefrom, to be attached to the wire sent to the plaintiff's traveller, thereby untruly and fraudulently to represent that the same was "anchor-brand wire" of the plaintiff's manufacture, in order fraudulently to obtain the profit that would arise from such untrue representation as was thereby made, and that the defendants had by the means aforesaid or by similar means for a considerable time before the institution of the suit, made large gains and profits by the fraudulent use of the plaintiff's trade-mark, or a trade-mark in imitation thereof, or only colourably differing therefrom, upon the tallies attached * to wire * 189 manufactured and sold by them or on their account, and in particular upon the tallies attached to such wire as was intended for the foreign market.

The prayer of the bill was, that an account might be taken of the gains and profits made and obtained by the defendants by the sale of wire having tallies or labels attached thereto with the plaintiff's trade-mark, or a trade-mark in imitation of, or only colourably differing from that of the plaintiff stamped or impressed thereon; and that the defendants might be ordered to pay to the plaintiff the amount of such gains and profits. That the defendants might be restrained by injunction from attaching to wire not the manufacture of the plaintiff any tally or label with the plaintiff's trade-mark, or any mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, and from otherwise using the plaintiff's trade-mark, or any mark in imitation thereof, so as to denote or represent that the said wire was the "anchor-brand wire," or was the manufacture of the plaintiff, and from selling or offering for sale, or procuring to be sold any wire not being of the plaintiff's manufacture, having a tally or label attached thereto with the plaintiff's trade-mark, or a mark in imitation thereof, or only colourably differing therefrom, stamped or impressed thereon, or otherwise in any manner having the said trade-mark or a mark in imitation thereof, or only colourably differing therefrom, attached thereto. That the defendants might deliver up to be cancelled all tallies, labels and papers in their possession or in the possession of their servants or agents having the said trade-mark so in colourable imitation of the plaintiff's as thereinbefore mentioned, and also all tallies, labels and

papers in their possession, or in the possession of their servants or agents, having the plaintiff's trade-mark or any mark in
 * 190 imitation thereof, or only colourably differing * therefrom stamped or impressed thereon, and also all dies for stamping or impressing the same; and that the defendants might pay all the costs of the suit.

The case made by the defendants in their answer was as follows:—

Until of late years the tallies which were used by wire manufacturers to distinguish their wire had been made of wood, sometimes with a number written thereon, and sometimes with a particular device branded thereon with a red-hot stamp. And the defendants believed that the plaintiff did, but at what time they did not know, adopt and use an anchor as his mark, such anchor being branded on wooden tallies.

An anchor was a very common mark in the iron trade and was used by many iron manufacturers, and in particular it was used by several iron manufacturers to distinguish the rods of which wire was made. And the defendants presumed that the mark of an anchor was adopted by the plaintiff, not so much to distinguish his wire from the wire of other manufacturers, as to represent to the public that it was made from anchor iron rods. In 1856, and before the defendants were aware that tin tallies were used by any other manufacturers, it had occurred to them to use tin instead of wooden tallies. Although they were aware that the plaintiff then used an anchor as a mark on his tallies, they were not aware that he then used tin tallies, if in fact he did so. And they considered that the use of a different material, as well as the introduction of a crown in the device, was sufficient to distinguish their wire, which they wished should be known as "crown and anchor wire," from the "anchor wire" of the plaintiff. They used a crown for

a similar reason to that which they believed caused the
 * 191 * use of the anchor, viz., that the crown was used as a mark by iron manufacturers. And in their trade of button manufacturers they were familiar with the device of a crown and anchor, which was used for the buttons of the royal navy, and which distinguished such buttons from those in use in the mercantile marine which had the impression of an anchor only, and from the buttons used in other naval services which have the anchor placed, as in the plaintiff's tallies, with a lion, a star, or

some other difference added above the anchor ; and they considered that by the use of a difference so well known and so familiar they should sufficiently avoid imitating the plaintiff's mark, and at the same time should be able to indicate the quality of iron of which their "crown and anchor wire" was made. And they submitted that the plaintiff had no right to adopt an anchor as a trade-mark to the exclusion of other manufacturers who made use of the "anchor iron" in the manufacture of their wire. They had learnt since the institution of the suit, but were previously ignorant, that the plaintiff had been in the habit of using an anchor as his trade-mark in his circulars, bill-heads and otherwise, and they had learnt since their use of the crown and anchor mark, but did not know before that time, that the plaintiff had had the anchor stamped upon metal labels, known in the trade as tallies, attached to each bundle of wire of a certain quality sent out from the manufactory ; but they did not know when the plaintiff introduced the use of metal instead of wooden tallies, and they said that with the plaintiff's best wire the labels sent out had been of brass, not of tin, and had then been sufficiently distinguished from their wire, not only by the difference in the device, but the difference in the metal.

They believed it to be true that in consequence of the plaintiff's trade-mark the wire of the quality so manufactured by him became known in the trade as "anchor-brand * wire," and * 192 admitted that it had from the excellence of its quality obtained a high reputation, but not that it was superior to their own "crown and anchor wire ;" and they denied that it was sold at a higher price than their own "crown and anchor wire," but they believed at the same price.

So far as they could ascertain, the manufacturer of tallies referred to in the bill was not any person who had been employed by them ; and the correspondence therein referred to did not refer to any dies or stamps which had been ordered by them, and they did not know to what the same referred.

The wire saved from the wreck of the Versailles was wire which had been supplied by them to Messrs. Smith, Kemp, & Wright of Birmingham, who had ordered twenty casks "bright iron wire," without specifying any mark, and the defendants' tallies bearing the crown and anchor had been attached to it as a

matter of course, and with no intention of passing the same off as the plaintiff's wire, and no object in so doing: and the defendants believed that Messrs. Smith, Kemp, & Wright, as well as all other houses in the trade, were perfectly aware of the difference between the marks, and considered the same as perfectly distinct marks, and were in no danger of confounding the same.

On the 12th of June, 1861, the defendants received a letter dated the preceding day, which was as follows:—

“ Liverpool, 11 June, 1861.

“ Messrs. Edelsten & Williams, Birmingham.

“ Gentlemen, — I am in want of the undernoted assortment of iron wire of the ‘ anchor ’ mark, which I believe you make.

* 193 Will you have the goodness to quote your * lowest cash prices. (Cash on receipt of invoice) delivered here. . . .

“ I am, Gentlemen, yours respectfully,

“ W. LLOYD.

“ Wire suitable for Paris points : —

“ No. 10	10½	11	11½	12	13	13½
5	3	4	5	5	4	3
7/10	7 1/10	8/2	8/2	8/8	9/2	9/5

“ Terms 2½ per cent cash. In Liverpool, in wrapping. . If the quality is approved of further orders may follow.”

In answer to such letter the defendants sent a letter containing the prices of their wire, and also enclosing one of their “ crown and anchor ” tallies, in order to denote the particular kind of wire.

In reply they received the following letter : —

“ 20, Exchange Street East, Liverpool,

“ 18th June, 1861.

“ Messrs. Edelsten & Williams.

“ Gentlemen, — I am obliged for your quotation dated 14th instant, and now beg you will forward the wire as early as possible as directed at foot hereof and hand me invoice (net). . . Please furnish me with a full list of your prices of wire delivered here. Trusting to your prompt attention,

“ I am, Gentlemen, yours respectfully,

“ W. LLOYD.

“ ‘Anchor-brand wire,’ suitable for Paris points : —

“ No. 10	10½	11	11½	12	13	13½	} 29 bundles.
5	3	4	4	5	4	3	

“ Packed in wrapping and marked Δ_P^W and 209 and upwards, about five bundles in all, to Waterloo Station.”

In pursuance of such letter, the defendants sent the
 * wire as ordered, with the invoice ; which invoice did not * 194
 refer to the brand of the wire ; and on the 27th of the same
 month they received the following letter : —

“ Liverpool, June 26th, 1861.

“ Messrs. Edelsten, Williams, & Edelsten.

“ Dear Sirs, — I regret to inform you that Mr. Lloyd is taken seriously ill, and I am desired to write to you in reference to the invoice received. You do not state what brand the wire is, nor if suitable for Paris points ; therefore will you please send us a corrected invoice, as Mr. L. was instructed to purchase the ‘ anchor-brand wire ’ only, also suitable for Paris points, and he sent you the order in accordance therewith. Mr. Lloyd is only buying on commission, and will have to produce your invoice to show the brand if required, otherwise the wire might be refused. Mr. Lloyd’s friends do a very large trade in wire, and, as before requested, he wishes you to send him a general list of prices for all numbers and the various qualities. Do you make square wire ? if not perhaps you can inform me who does. On receipt of corrected invoice a draft will be remitted at once for the amount.

“ I am, dear Sirs, yours respectfully,

“ Signed *pro* W. LLOYD,

“ THOS. PARTRIDGE,

“ P.S. — Please address to Mr. L. as before.”

In answer to such letter, the defendants sent a letter, which was as follows : —

“ Birmingham, 27th June, 1861.

“ Mr. W. Lloyd, Liverpool.

“ Sir, — In reply to yours of the 26th inst. we enclose duplicate invoice as requested, also one of our brands which are affixed to the wire according to the respective * sizes. In * 195

quoting our prices we sent you a brand, which is the "crown and anchor," and we now enclose you another brand, also list of prices of iron wire. We make square, oval, and half-round wire, and if you will let us know the sizes you require, and for what purpose it is required, we will give you a quotation; and at the same time we will thank you to give us two respectable references, as you are a stranger to us. Waiting your reply,

"We are, Sir, yours very respectfully,

"EDELSTEN, WILLIAMS, & Co."

They had no intention of passing off their wire as the plaintiff's wire, and no person in the trade could have mistaken the wire so sent for the plaintiff's. The wire so sent, and also the wire saved from the wreck of the Versailles, had tallies attached thereto, stamped with the "crown and anchor," and such tallies were similar to the plaintiff's present tallies for some wire, but not for his best wire, so far as regards shape and material; but such shape and materials were then common to all wire manufacturers; and the defendants denied that their tallies were similar to the plaintiff's, as regards the device stamped thereon, the "crown and anchor" being a well-known device, and considered by all persons in the trade as an entirely distinct device from an "anchor" alone.

They denied that it had been or was intended by them to mislead purchasers of wire, or induce them to believe that when purchasing the wire manufactured by the defendants they were purchasing "anchor-brand wire" manufactured by the plaintiff.

They then proceeded to show by the correspondence which had taken place, without prejudice on the part of the defendants, * 196 between the parties, that the suit had * been rendered unnecessary by the terms of submission proposed on the part of the defendants (and which it was argued conceded every thing that could be reasonably demanded), and traversed the remaining allegations contained in the plaintiff's bill.

The case came on, on motion for decree, before the Vice-Chancellor, on the 18th July, 1862, when his Honor held that fraud was clearly established on the part of the defendants in what had passed between the parties, and made a decree in the terms of the prayer of the bill, remarking that the account could not be limited in the way proposed by the defendant's counsel; and that as to

the grounds advanced in favour of such limitation, the case of *Sykes v. Sykes* (a) showed, that though the persons to whom the sale was made might not be deceived, still the action lay, because the article was sold by them, and they might go and deceive every one else ; and that those who committed a fraud must take all the consequences.

From this decision the defendants appealed.

Mr. Rolt and *Mr. Leonard Field*, for the plaintiff, the respondent, supported the decree of the Vice-Chancellor.

Sir Hugh Cairns, *Mr. Giffard*, and *Mr. Archibald Smith* were for the appellants. — It was contended on behalf of the plaintiff, that no such thing was proved to be known in the iron trade as crown and anchor iron, or as anchor iron rods ; and that even if there were such things as anchor iron rods, it was clear upon the evidence that the plaintiff had never used them in the manufacture of his wire. That the statements of the defendants as to the anchor-brand * wire not fetching a higher price in the * 197 market than the crown and anchor wire were disproved. That even assuming it to be true, as it was not, but as was suggested on the part of the defendants that the plaintiff himself had, in taking his anchor brand, knowingly adopted a mark previously used by other persons, it was clear upon the evidence that such previous use had ceased before the adoption of the mark by the plaintiff. That it appeared from the case of the person at Liverpool who wrote to the plaintiff about the wire saved from the wreck of the *Versailles*, and otherwise, that the public had actually been deceived by the defendants' use of their crown and anchor mark and tally ; and that consequently the offers made on the part of the defendants as the terms of compromise of the litigation fell below the plaintiff's strict rights to an injunction, account, and costs.

On behalf of the defendants it was contended, that the anchor mark was not merely the mark of the manufacturer, but the mark of quality of the manufacture, and that the crown and anchor wire of the defendants represented wire of a similar quality to the anchor wire of the plaintiff. It was submitted

that, if it were necessary to resort to that argument, the brands in themselves were sufficiently distinct, and that when such a mark as an anchor was adopted by a tradesman — a mark which had frequently been in use by another tradesman, and which, though not for the same article, was still used by a number of other tradesmen — one of them, particularly if he had not been the first to use the mark, could not adopt that single mark and say as against all the world, that no one should take that mark, even with a difference. It was further argued, that the facts of tin tallies of the shape in question being the common property of the whole trade, and of every thing depending

* 198 therefore * upon the mark on the tallies, as also the additional fact of the anchor being a common mark, were sufficient to remove the inference which might otherwise have arisen from the resemblance of the substance, material, shape, and general aspect of the tallies in dispute; and that even if the contention had been for the right to use the trade-mark, the plaintiff would not have been entitled to any injunction against the defendants. But admitting the plaintiff to have had such right, his claim for an account and compensation would have depended entirely on the question of a fraudulent use of the trade-mark. For although if the trade-marks had been held to be too similar, the plaintiff might have had a right to restrain the defendants: yet if at the moment when the complaint had been made to them of the similarity they had offered to abandon the use of their own mark, and the plaintiff had nevertheless filed his bill, the question would have been entirely one of fraud or no fraud, and, if no fraud had been found to have existed, the plaintiff would not have been entitled to an account of what the defendants had sold innocently and without knowing that the use of their mark would interfere with the mark of the plaintiff. That in the present case, every charge of fraud brought against the defendants had been disproved. They had gone on from 1856 to 1861 without any complaint on the part of the plaintiff, and if the Court should go back and give an account such as was sought by the plaintiff it would be tantamount to saying, that where an order had been sent for Edelsten & Williams' crown and anchor wire, and bundles of Edelsten & Williams' crown and anchor wire had been remitted accordingly, such a proceeding was improper, although the persons giving the order knew the whole circumstances of the case, and

were perfectly cognizant of both marks, but, either from the price, or quality, or the convenience of access, preferred the defendants' * wire to that of the plaintiff. To give the * 199 plaintiff the profits of such wire would be carrying the matter beyond all precedent and all justice.

Millington v. Fox (a) was referred to.

January 28.

THE LORD CHANCELLOR. — The questions are whether the plaintiff had property in the trade-mark claimed by him before the adoption of it by the defendants, and if so, whether the mark of the defendants is substantially the same as the trade-mark of the plaintiff, and therefore an invasion of his property ; and thirdly, whether the defendants have used the plaintiff's trade-mark with knowledge of the right of the plaintiff.

The last question is material with reference to the extent of the relief to be granted. For although it is well founded in reason, and also settled by decision, that if A. has acquired property in a trade-mark, which is afterwards adopted and used by B. in ignorance of A.'s right, A. is entitled to an injunction ; yet he is not entitled to any account of profits or compensation, except in respect of any user by B. after he became aware of the prior ownership.

At law the proper remedy is by an action on the case for deceit : and proof of fraud on the part of the defendant is of the essence of the action : but this Court will act on the principle of protecting property alone, and it is not necessary for the injunction to prove fraud in the defendant, or that the credit of the plaintiff is injured by the sale of an inferior article. The injury done to * the plaintiff in his trade by loss of custom is sufficient * 200 to support his title to relief. Neither will the plaintiff be deprived of remedy in equity, even if it be shown by the defendant that all the persons who bought from him goods bearing the plaintiff's trade-mark were well aware that they were not of the plaintiff's manufacture. If the goods were so supplied by the defendants for the purpose of being sold again in the market, the injury to the plaintiff is sufficient. Again, it is not necessary for

relief in equity, that proof should be given of persons having been actually deceived, and having bought goods with the defendant's mark, under the belief that they were of the manufacture of the plaintiff, provided the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other.

I advert to these general rules because they meet some portions of the argument addressed to me by the defendants. On the first question, what is the trade-mark of the plaintiff, and whether he had acquired property in it before the alleged imitation of it by the defendants; it is proved that the mark of the plaintiff consists of the emblem or representation of an anchor stamped on a disk or circular piece of tin, about the size of a shilling, and on which are also impressed a number denoting the size of the wire and the words "iron wire," and which metal stamp is attached as a tally to each coil or bundle of wire sent out from the manufactory of the plaintiff.

The plaintiff also uses the device of an anchor stamped on his circular letters, invoices, and bills relating to his goods, and by these means the wire of the plaintiff has long since gained and possesses a peculiar denomination in the trade, "the anchor-
* 201 brand wire" or "anchor * wire," and being of very superior quality it is much sought after in the market, and has acquired high reputation. The plaintiff began to use this tally and device in the month of September, 1852, and has used it continuously in an extensive trade down to the present time.

These facts are so far from being disputed by the defendants, that they distinctly state their belief in the third paragraph of their answer that, "in consequence of the said trade-mark of the plaintiff the wire of the said quality so manufactured by him became known in the trade as 'anchor-brand wire,'" and admit "that it has, from the excellence of its quality, obtained a high reputation." It is plain, therefore, that the plaintiff has all the essentials of a right of property in the trade-mark claimed by him, and that this right extends to two things, first, the device or emblem of an anchor attached to the wire, and second, the name "anchor-brand wire" or "anchor wire," which has resulted from the use of the device, and has become the distinctive appellation in the market of the wire manufactured by the plaintiff.

With respect to the next question, that of the intentional imitation

of the plaintiff's trade-mark by the defendants, it appears from the statements in the second paragraph of the answer, that in the year 1856, the plaintiff's mark was well known to the defendants, and that in that year the defendants also became desirous of affixing a mark by means of a tally to the wire they manufactured, and they determined to use the device of an anchor in order, as I am compelled to infer, that they might have the benefit of the reputation which that mark had already acquired.

But they determined to use this device with a difference, and they must have credit for some ingenuity in *their * 202 reasoning on the subject. They say, "in our trade of button manufacturers we were familiar with the device of a crown and anchor, which is used for the buttons of the royal navy, and which distinguishes such buttons from those in use in the mercantile marine, which have the impression of an anchor only, and from the buttons used in other naval services . . . and we considered that by the use of a difference so well known and so familiar we should sufficiently avoid imitating the plaintiff's mark, and at the same time be able to indicate the quality of iron of which our crown and anchor wire was made." I think the whole case of the plaintiff is confessed in this passage and in the third paragraph, to which I have previously referred.

It is urged that there is no proof of any purchaser having been deceived by the defendants, and that the difference between the anchor and the crown and anchor is well known, and sufficient to prevent the one being mistaken for the other. But the essential part of the plaintiff's trade-mark is the anchor, from which the market name of his wire has been derived, and this has been deliberately taken by the defendants and impressed on a tally, similar in shape, colour and material, to the plaintiff's, plainly for the double purpose of having a mark affixed to their goods which might be easily taken for the plaintiff's, and also of being able to use in the market the denomination of anchor wire.

There is a suggestion in the answer, that the plaintiff adopted the device of an anchor in order to show that his wire was made from iron rods called "anchor iron rods," and that the defendants adopted the emblem of an anchor for the same reason; but there is no evidence whatever in support of this suggestion nor any attempt to prove either, that there are rods of iron known in the * market as anchor iron rods, or that rods with this * 203

name or brand have been used either by the plaintiff, or defendants, for making wire.

It is not necessary for the support of the plaintiff's case, that use should be made of the correspondence of an agent of the plaintiff, under the name of Lloyd, with the defendants; but if such correspondence be received and examined, it will be found to warrant two conclusions of fact, first, that a specific order for anchor-brand wire having been sent to the defendants (which it must be remembered, they admit to be the peculiar name of the plaintiff's wire) they supplied their own wire as being the wire known by that name; and, secondly, that they sent one of their own crown and anchor tallies as being the proper mark or tally of the wire so denominated.

I cannot doubt, therefore, that the acts of the defendants amount, in law, to a piracy of the plaintiff's trade-mark, both in the emblem and the name.

It is then objected by the defendants, that the account of profits directed by the decree is too severe; but, on examination of it, I am of opinion, that the account is in terms as lenient as can be directed consistently with the principles of the Court.

Finally it is insisted that the suit was unnecessary; inasmuch as it is alleged that the terms offered by the defendants were all that could be reasonably demanded.

I cannot take notice of negotiations antecedent to a suit (save in cases of bad faith) unless they amount to a release, or binding agreement, with respect to the cause of action.¹ Neither
* 204 will I assume any arbitrary power of * dealing with the costs of the suit. If the plaintiff is found entitled to the relief he asks, he is entitled to the costs of the suit in which it is given.

The defendants have used the suit for the purpose of contesting and denying the plaintiff's right altogether, instead of submitting to the decree to which he was entitled. They have taken the chance of benefit from the suit, and must pay the costs of the litigation.² I dismiss the petition of rehearing with costs.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1394, 1395; Kerr Inj. 229, 230.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1381, and note (4); Kerr Inj. 491; Upham v. Elkah, L. R. 12 Eq. 140.

LORD DARNLEY v. THE LONDON, CHATHAM, AND
DOVER RAILWAY COMPANY.

1862. December 4, 8, 9. 1863. January 22, 23, 24, 26. February 14.
Before the LORDS JUSTICES.

A land-owner agreed to sell land to a railway company, and the company agreed to make such crossings as the land-owner's surveyor should, within one month after the company took possession, direct in writing. No award was made by the surveyor until about two months after possession had been taken. The company having refused to make some crossings directed by the award the land-owner filed his bill, alleging conduct on the part of the company amounting to a waiver of the limitation of the time for making the award, insisting on the direction of the surveyor as binding, and praying that the company might be decreed to make the works directed by it, but not distinctly putting forward any case for specific performance of the agreement independently of the award. The Court being of opinion that the award was not binding upon the company, and that the title to relief independently of the award was not put forward with sufficient distinctness to make it right to give relief on that footing, gave the plaintiff leave to withdraw replication and amend his bill by putting in issue any claim founded on the original agreement.¹

THIS was an appeal by the defendants, the London, Chatham and Dover Railway Company (which company had succeeded to the undertaking of the East Kent Railway Company), from a decree of Vice-Chancellor STUART, by which it was ordered, that the defendants the company should specifically perform the agreement in the bill mentioned of the 22d day of June, 1858, so far as the same remained unperformed, and make, do and perform the several works and matters comprised in and described by the award or notification in the plaintiff's bill mentioned * 205 of the 5th of March, 1859, and also construct the cattle arch in the said bill mentioned at the point X marked out and indicated by the said award or notification and the map or plans annexed thereto, and that the company should pay the costs of the suit.

The agreement, of which the specific performance was prayed by the bill, was dated the 22d of June, 1858, and made between

¹ See Attorney-General v. Cambridge Consumers Gas Co., L. R. 6 Eq. 308, 309; S. C. L. R. 4 Ch. Ap. 71; Walker v. Armstrong, 8 De G., M. & G. 534, 535; 1 Dan. Ch. Pr. (4th Am. ed.) 418.

the railway company of the one part and Lord Darnley of the other part, and thereby after reciting that the company were the promoters of a bill which was then pending in Parliament, whereby it was proposed to authorize the company to make and maintain a railway thereafter called the Extension Railway, in extension of the East Kent Railway, and which if made would pass near to Cobham Hall, a seat of the plaintiff's, and for a considerable distance through his lands ; and reciting that the plaintiff had petitioned Parliament against the passing of the then pending bill ; and that it was of importance to the company that the opposition of the plaintiff to the bill should be withdrawn, and that the parties thereto had therefore determined to enter into the agreement thereafter appearing, it was provided, conditionally upon the bill being passed in the then session of Parliament, that the company should be at liberty to take so much of the plaintiff's land, not exceeding 50a. 2r. as they might require, but that they should not take any more without his consent, and that they should pay a clear 8000*l.* for the land ; and the 10th article was as follows :—

“The company will make and maintain for the convenience of the earl's estate so many crossings across the Extension Railway, and of such kinds, whether above, below, or on the level,
 * 206 as Mr. John Clutton, or * him failing, the engineer or surveyor of the earl, his heirs or assigns, shall within one month after obtaining possession of the land of the earl, direct and notify in writing to the company of their engineer.”

Article 13 was as follows :—

“The company will perform and observe articles 3 to 11 both inclusive respectively (if those articles respectively shall have effect), to the reasonable satisfaction in all respects of Mr. John Clutton, or him failing, of a competent surveyor to be named by the Right Honourable Edward Cardwell.”

The bill in Parliament mentioned in this agreement passed into a law in the then session of Parliament, and the agreement accordingly took effect. On the 8th of December, 1858, the company entered into possession of the land which they had agreed to

purchase, and paid the purchase-money stipulated for by the agreement; but the land was not then and has not since been conveyed to them.

Before this, in November, 1858, a meeting had taken place, between Mr. Clutton and Mr. Cubitt the engineer of the company, relative to the crossings, and Mr. Clutton verbally stated to Mr. Cubitt certain crossings which he required to have made, but did not, within one month after the company took possession of the land, direct or notify in writing to the company or their engineer what crossings were to be made and maintained by the company across the Extension Railway for the convenience of the plaintiff's estate; but on the 5th of March, 1859, nearly two months after the expiration of the month from the time of the company's taking possession, and when the company's works had considerably progressed, he made an award or notification in writing, specifying the crossings * which were so to be made and main- * 207 tained, and of what kinds such crossings were to be, whether above, below, or on the level. The crossings specified by this award or notification were the works and matters which it was prayed by the bill that the defendants the company might be decreed to do, make and perform, the most important one being the cattle arch mentioned in the decree as stated above. In June, 1860, the company, who denied having received any notice of this award till June, 1859, refused to submit to it, alleging that they had done all the works required by Mr. Clutton at the meeting in November, 1858, and denying their liability to do any thing more. By June, 1859, the embankment through which the cattle arch would have to be made, had been constructed. Much discussion took place between the parties, and proposals were made for a reference to arbitration; but ultimately, the company persisting in their refusal to execute the further works, the plaintiff, in December, 1860, filed his bill, which stated the agreement and the taking possession by the company, and then proceeded to allege that Mr. Cubitt the engineer of the company had suggested various modifications in the crossings proposed by Mr. Clutton, which modifications would require the making of roads as well as crossings, and that Mr. Cubitt thereupon applied to Mr. Oakley, an agent of the company, for an assurance that any directions he might give as to roads would be executed by the company and that Mr. Oakley had given such assurance in writing. The bill then

in the 8th paragraph alleged that, in reliance upon and full faith and confidence in the assurance given by Mr. Oakley as the recognized agent of the company, Mr. Clutton considered Mr. Cubitt's suggestions, and that the consideration of them occasioned him great difficulty and trouble, so that he could not make his award

within the month, but that he made it on the 5th of March,

* 208 1859. The bill then set out the award, and * alleged in the 10th paragraph, that down to the time when the award was made, communications as to the crossings and the works incident to them had been going on between Mr. Clutton on behalf of the plaintiff with the company and their agents, and that it was throughout such communications distinctly understood and agreed to on both sides, that the time for making the award should be extended for a reasonable time. The bill proceeded to state the communications which took place after the award, and after stating that the plaintiff had performed his part of the agreement of the 22d of June, 1858, submitted that the company were bound and ought to be compelled to comply with and perform the several requisitions and directions of the award or notification of Mr. Clutton; and it prayed that the defendants the railway company might be compelled by the decree of the Court specifically to perform the agreement of the 22d day of June, 1858, so far as the same remained unperformed, and to make, do, and perform the several works and matters comprised in and described by the award or notification of the 5th of March, 1859, and in particular that they might be decreed to construct the cattle arch, at the point X marked out and indicated by the award and the maps or plans annexed thereto.

The defendants the company, by their answer, set forth the grounds on which they contended that they were not bound by the award, into which reasons it is not necessary for the purpose of the present report to enter. They alleged that at the meeting between Mr. Cubitt and Mr. Clutton in November, 1858, Mr. Cubitt had pointed out what crossings he should require, leaving only certain matters of detail unsettled. That they had made all the crossings which he had then directed; and that what was now claimed was beyond the understanding then come to, and

* 209 could not be performed without great difficulty * and expense, after their works had proceeded so far on the footing that the crossings already made were all that would be required.

The cause came on for hearing before Vice-Chancellor STUART, replication having been filed.

His Honor considered that the plaintiff had made out his case as to the extension of time for making the award, and he accordingly made a decree in the plaintiff's favour, from which the defendants appealed.

December 4, 8, 9.

Mr. Bacon and *Mr. Hardy*, for the plaintiff, in support of the decree. — The objection taken by the company to the award, on the ground of its having been made after the specified time, cannot prevail, for the company made proposals to the plaintiff which led to a negotiation, in consequence of which the award was not made in due time, the delay which occurred being solely for the convenience of the company. They complain of its being unreasonable that they should now be called upon to make these crossings which might have been made so much more easily before their embankment was formed, but the embankment was made after the award and while the company was delaying the taking it up. *Hawksworth v. Brammal*. (a)

Mr. Malins and *Mr. Cotton*, for the defendants. — We do not deny that a contract was entered into between the plaintiff and the company, of which this Court would decree specific performance, if sought at a proper time and under proper circumstances. But we * say that the company has complied with all the * 210 requisitions which Clutton made, during the period within which he had power to make an award: he never required us to make this cattle arch; and the Court will not require us to make it now, when our works are so far advanced that it cannot be made without enormous additional expense and inconvenience. Though the award was made in March, 1859, it was not communicated to us till June, 1859, and the correspondence up to that period does not mention a cattle arch. The embankment was finished by that time, and the line is now opened, so that making this arch, which at one time would have been easy, is now a serious matter. The award having been made after the time limited is not binding. No doubt the conduct of parties in a reference may be such as to extend

the time for making an award. But in the present case, nothing is shown by which the company can be considered to have waived the stipulation as to time.

Mr. Bacon, in reply.

Their Lordships on a subsequent day intimated, that in their opinion the award was not binding on the company, and desired to have the case further argued as to what, in that view of the case, was the proper order to be made.

1863. January 22, 23, 24, 26.

Mr. Bacon and *Mr. Hardy*, for the plaintiff. — If the award be invalid, still there is a subsisting agreement on the part of the company to make proper crossings, and the Court will decree specific performance of that agreement. *Sanderson v. Cockermouth*

Railway Company, (a) *Storer v. Great Western Railway*
* 211 *Company*. (b) * We ask that the company may be ordered to make the cattle arch, and to do the works mentioned in paragraphs 8 and 9 of the bill, as being works necessary for the convenience of the plaintiff's estate, the award being sufficient evidence that they are works which ought to be done; or if necessary, that an inquiry may be directed what crossings are necessary and proper and required for making and maintaining convenient communications between the different parts of the plaintiff's lands.

The substance of the agreement is, that the plaintiff is to have all reasonable and necessary crossings. The defendants will probably rely on *Milnes v. Gery* (c), but that case went on the ground that there was no contract. Here there is a contract, and the Court will see it carried out in substance. The case is analogous to those relating to the sale of property at a valuation to be made in a particular way; if the valuation cannot be made in that way, the Court will ascertain the value. *Gregory v. Mighell*, (d) *Gourlay v. Duke of Somerset*, (e) *Jackson v. Jackson*. (g)

Mr. Malins and *Mr. Cotton*, for the company. — This is a bill

(a) 11 Beav. 497; S. C. on appeal, 19, L. J. N. S. 506, Ch.

(b) 2 Y. & C. C. C. 48.

(c) 19 Ves. 429.

(c) 14 Ves. 400.

(g) 1 Sm. & G. 184.

(d) 18 Ves. 328.

for specific performance of the award, and if the award be out of the way, no bill lies to compel us to make proper crossings, the jurisdiction for that purpose being in the justices under the Railway Clauses Act. But if there be jurisdiction, the bill is not properly framed for obtaining such relief as is now asked. There is no allegation of any right to crossings except according to the award, and no alternative relief in the event of the award being held not binding is prayed. The contract was to do more than the Act required, if Clutton * should within a month so direct, * 212 and as he did not give any direction within the time we are thrown back upon the Act, and it is not a case in which a Court of Equity can decree specific performance. The case might have been otherwise, if the agreement had been that we would make all proper crossings; but that is not the case, the agreement is only to make such proper crossings as shall be directed within a specified time, and as no direction was given the contract is at an end. The bill does not contain any allegation of an agreement to make all proper crossings, nor that more crossings are requisite than those which have been made. *Watts v. Hyde* (a) is against allowing the plaintiff to amend, and *Palk v. Clinton* (b) does not support the opposite view.

[*Mr. Hardy* referred to *Duke of Devonshire v. Eglin*. (c)]

The case is different from that of an agreement to make all necessary crossings, with a superadded reference to an arbitrator to determine what crossings were proper: here the surveyor's requiring the crossings within the month is a condition precedent: *Brooke v. Garrod*, (d) *Scott v. Avery*, (e) and even if not, still time is of the essence of the contract: *Darbey v. Whitaker*, (g) *Tillett v. Charing Cross Bridge Company*. (h) If any relief is granted at all, it can only be, at present, an inquiry what crossings are necessary.

Mr. Hardy, in reply. — If the bill is dismissed, the plaintiff will be at the mercy of the company, for the provisions of the Railway

(a) 2 Phil. 406.

(b) 12 Ves. 48.

(c) 14 Beav. 531.

(d) 3 K. & J. 608; 2 De G. & J. 62.

(e) 5 H. L. Cas. 811.

(g) 4 Drew. 134.

(h) 26 Beav. 419.

- Clauses Act will not be available. *Sanderson v. Cocker-*
 * 213 *mouth Railway Company.* (a) If relief cannot be given * on
 the record as it stands, leave will be given to amend the bill.
Palk v. Clinton, (b) Childers v. Childers, (c) Filkin v. Hill. (d)

Judgment reserved.

February 14.

THE LORD JUSTICE KNIGHT BRUCE. — The bill in this cause, filed on the 8th of December, 1860, asks a decree for the specific performance by the defendants the London, Chatham and Dover Railway Company (formerly styled the East Kent Railway Company) of a written agreement, dated the 22d of June, 1858, made between them and the plaintiff, so far as remaining unperformed, — an agreement, by which the plaintiff and the company respectively acknowledge themselves to be bound. It is set forth in the 3rd paragraph of the bill. The proposed statute, mentioned in the 1st article of the agreement, having passed in the session of Parliament also there mentioned. It is admitted, that some material acts have been done on each side in performance, or part performance, of the agreement. The prayer of the bill is thus: [His Lordship read the prayer.]

The document which the prayer calls, “the hereinbefore-mentioned award, or notification, of the 5th of March, 1859,” is set forth in the ninth paragraph of the bill, and is described, or mentioned, in its eighth paragraph. [His Lordship here read that paragraph; the substance of which has been given above.]

The controversy in the cause is, mainly, upon the award,
 * 214 or alleged award, of the 5th of March, 1859, the * plaintiff alleging and insisting, and the company denying, that it binds the company; and the dispute turns chiefly on the tenth article of the agreement. The company having obtained in December, 1858, the possession mentioned in that article, did so, therefore, not merely more than a month, but more than two months, before the 5th of March, 1859, the day on which the award, or alleged award, was made. The contention upon the plaintiff’s part is, that the period of “one month” mentioned in the tenth article of the agreement, was not essential; that, notwithstanding

(a) 11 Beav. 497; 19 L. J. N. S. 506, Ch.

(b) 12 Ves. 48.

(c) 1 De G. & J. 482.

(d) 4 Bro. P. C. 640.

its language, the direction and notification specified in that article might well, whether without or with consent, be made at a time after the expiration of the month; but that, however this point ought to be treated, there was contract or conduct on the company's part sufficient to warrant the award, or alleged award, being made as it was made, and being effectually made on the 5th of March, 1859. As to this portion of the case, the plaintiff relies very much on communications which took place between Mr. Clutton, and Mr. John Oakley, a land surveyor, employed, or occasionally employed, by the company. But Mr. Oakley seems not to have been employed by the company as an engineer; and it does not appear to me, that there was on the company's part, a clear or sufficient agreement or consent to enlarge or extend the time of one month fixed by the tenth article of the agreement of the 22d of June, 1858; nor does it seem to me, that there was conduct on the part of the company, or of any authorized agent of the company, sufficient to preclude the company from rejecting the alleged award as made without due authority. And I am of opinion that they were not, nor are, more bound by the alleged award of the 5th of March, 1859, than if the instrument had never existed.

* The plaintiff's counsel have, however, ably contended * 215 that, even upon that hypothesis, he is entitled to relief under the bill as it stands, and to have now a decree, ordering the company to make for him the crossings which, as he insists, he ought to have, for the purpose of communication between his lands on each side of the railway, in addition to those already made. But I am not satisfied that whatever may in this respect, apart from any question upon the frame of the bill as it stands, be the merits of the dispute on either side, relief ought to be granted on the actual record, the opinion of the Court being as it is on the subject of the alleged award. And I conceive, that either we should dismiss the present bill without costs, and without prejudice to any question or future suit; or we should — discharging the decree, without prejudice to any question — give leave to the plaintiff to amend the bill within three or four weeks as he may be advised, confining the amendments, however, to alleging matters, and praying relief arising out of the agreement of the 22d of June, 1858; or founded on it, or connected with it, and to omitting or altering accordingly any portion of the bill as

it stands. My opinion is in favour of the latter of these two courses; and all costs had better, I think, be reserved, unless, possibly, the deposit.

The Lord Justice TURNER, after stating the facts, proceeded as follows:—

The first and most material question in the cause, of course, must be, whether the defendants, the company, are bound by the award or notification of the 5th of March, 1859, notwithstanding it was made after the time prescribed by the agreement had elapsed.

[His Lordship then entered into the evidence, and gave his reasons for coming to the conclusion that time was originally * 216 nally * of the essence of the contract, and that there had been no such conduct on the part of the company as could operate either as an extension of the time in making the award, or as a waiver of the objection that it was not made within the prescribed time, and proceeded as follows:—

It is upon these grounds I have come to the conclusion, that this decree cannot be supported so far as it directs the defendants to do the works specified in the award.

It remains, then, to be considered in what mode this case ought to have been and ought now to be dealt with. It has been contended for the plaintiff that, independently of the award, the agreement gives him the right to have all necessary and proper crossings made, and that the award ought to be considered as determining what are the necessary and proper crossings, or that an inquiry ought to be directed upon that point; and it is asked, on the part of the plaintiff, that a decree may now be made accordingly; but this bill, if it can be considered to point at all to any claim of the plaintiff independently of the award, certainly does not point to any such claim with any degree of distinctness, or in any such mode as could lead the defendants to suppose that they were called upon to meet such a case. The award is so prominently relied upon throughout this bill, that the defendants must have been led to suppose that it was upon the award, and the award only, the plaintiff relied; and that it was upon that point, and that point only, the suit was instituted, and was intended to

proceed. Under these circumstances, I do not think that upon the record, as it stands, we could be justified in giving the plaintiff the decree which is asked on his behalf; and the question then arises, whether leave should be given to the plaintiff to amend his bill, or whether the bill should be dismissed without

* prejudice to a new bill. The plaintiff, in support of the * 217 leave to amend being given, relies upon the case of *Filkin*

v. *Hill*. (a) The defendants, in support of the bill being dismissed, rely upon the case of *Watts v. Hyde*. (b) By the kindness of two of the officers of the Court, Mr. Latham and Mr. Murray, I have obtained a tolerably full account of the case of *Filkin v.*

Hill. The decree in that case was made by the Lord Chancellor, on the 11th of November, 1719; and from a copy of that decree, with which I have been furnished, (c) it appears, that the bill certainly did not distinctly raise the points on which the issues were directed, but it appears that the bill contained allegations which had reference to the defendant Mrs. Filkin having been brought up in the Roman Catholic religion; and in the answer it was stated, that the ceremony of her marriage with Filkin had been twice performed; once in a Roman Catholic chapel, and once in the Fleet Prison, by a person in the garb of a minister of the Church of England. There were, therefore, matters in issue which bore upon the points as to which the issues were directed. The order of the House of Lords, bearing date the 13th of May, 1720, was as follows:—

“Ordered, that such part of the said decree complained of as directs the trial of the several issues therein mentioned be reversed, and that the now respondent in the original bill be at liberty to amend the said bill as to the several matters intended to be tried by the said issues, and that the said decree as to all other the matters complained of be affirmed.”

After this order was made there was, as appears from the six clerks' books, an order of this Court to amend the bill dated in July, 1720; and there is a note upon * the bill that it was * 218 amended accordingly, but this order cannot be found. There were afterwards several other orders to amend, and finally

(a) 4 Bro. P. C. 640.

(c) See *Hill v. Eyre*, *infra*.

(b) 2 Phil. 406.

the bill was dismissed by an order bearing date the 8th of June, 1725. This case, therefore, is a strong authority in favour of giving the plaintiff leave to amend.

There is also a case of *Bierdermann v. Seymour*, (a) in which Lord LANGDALE dealt with this question. What he said upon it was this:—

“ It appears to me to be clear, that this suit is defective for want of parties, and considering what has been stated, the interests of the parties, and the questions which may arise, I am of opinion that the bill does not contain such statements and allegations as are necessary to enable the Court to carry the will duly into execution; nevertheless, from the statements which are now made, it appears that there are serious questions which may arise between these parties; and I should, therefore, be very reluctant to deprive them of any benefit which may be derived from the proceedings which have already taken place. With respect to giving leave to amend, my opinion is the same as it was in the case referred to of the demurrer. It is the duty of the plaintiff to come fully prepared to ask the Court for a decree; and if he is not so prepared, and it appears that the suit is defective from his default, then I think that it is what it is usually called an indulgence, to give the plaintiff leave to supply that defect afterwards; it becomes the duty of the Court to consider whether, for promoting the ends of justice, leave should be given or not. I do not think it is a right which the plaintiff can demand of the Court, but if he offers good reasons why this indulgence should be granted, then it is the duty of the Court to grant it: but if no good reasons are shown, then it is

* 219 equally the duty of the Court to refuse * the application.

Now this case has twice come on for hearing, and has, on both occasions, been defective for want of parties; yet it is a case in which probably some advantage may be taken of the proceedings which have taken place, and of the answers which have been put in. One of two courses must be adopted, either this suit must be dismissed altogether, giving the plaintiffs leave to commence *de novo*, or the plaintiffs may have leave to put this suit into a proper state, making amends, as far as they can, for the inconvenience and expense which the defendants have been put to by the former imperfections of this suit. On the whole, I think the plaintiffs

(a) 1 Beav. 594..

must pay the defendants the costs of the original hearing, and those which have been occasioned by the present hearing ; but, at the same time, I think I ought to give them leave to put this suit in a proper state, either by amending it or by filing a supplemental bill."

This case, therefore, is also in the plaintiff's favour upon the point of giving leave to amend ; and, although the case of *Watts v. Hyde* (a) leans the other way, it is to be observed that the matter proposed to be introduced by amendment in that case was matter quite unconnected with the case which was already upon the record ; and Lord COTTENHAM's observations in that case with reference to *Palk v. Clinton*, (b) that the specific relief which was there prayed prevented relief being given under the general prayer, seem to me to be by no means inapposite to the present case. In cases of this description, depending so much upon the discretion of the Court, no general rule can be laid down ; but speaking generally, I should think that leave should be given to amend where matters connected with what is proposed to be introduced by amendment are already in issue, but that the bill should be dismissed without prejudice in cases in which the * question * 220 is, whether new matter unconnected with what is already in issue should be allowed to be introduced into the record. Under the circumstances of the present case, I think that leave to amend should be given, but I think that the leave should be confined to putting in issue claims founded upon the agreement, or matters arising thereout or connected therewith, and such facts and circumstances as may be necessary or proper for bringing forward and supporting such claims ; and I think it more just that the costs should be reserved than that they should be dealt with as in *Bierdermann v. Seymour*. (c)

HILL v. EYRE.

FILKIN v. EYRE.

THE bill in the first of these causes was filed in 1717, by Roger Hill and John Hill, an infant, by Roger Hill, his father and next friend, against Eyre, Bush, Richard Filkin, and Frances his wife, and Rawlins. It stated to the effect, that by Roger Hill's marriage settlement, dated in 1702, in consideration of the wife's

(a) 2 Phill. 406.

(b) 12 Ves. 48.

(c) 1 Beav. 594.

portion of 800*l.*, of which part was paid down, and 300*l.* was secured to be paid after the death of Francis Stevenson, Roger Hill's father settled an estate on Roger Hill's wife for her jointure, and entailed it on the issue of the marriage, with a limitation over in default of issue to the heirs of Roger Hill, subject to a mortgage of 500*l.* That the issue of the marriage were the plaintiff John Hill, and the defendant Frances Filkin, and that the wife died whilst they were young. That Francis Stevenson and Anne, his wife, who was grandmother to John Hill and Frances Filkin, prevailed on Roger Hill to assign 200*l.* out of the 300*l.* to them, in trust for the maintenance of John Hill, the other 100*l.* to go in discharge of part of the 500*l.* mortgage. That Francis Stevenson died, bequeathing 10*l.* to John Hill, and making his wife Anne Stevenson executrix. That Anne Stevenson made her will, dated 8th May, 1716, and bequeathed to John Hill 100*l.* at the age of twenty-one, and to Frances Filkin her watch, ring, and plate, and gave to the defendants Eyre, Bush, and Rawlins her real and personal estate in trust to pay debts, &c., and to pay the residue to Frances Filkin when she attained twenty-one, or married with the consent of Eyre and Bush; but if she died under twenty-one, or married without their consent, then to pay the same to John Hill; and in case both died under twenty-one, then to pay several legacies, and to dispose of the residue to such uses, intents, and purposes

* 221 as the testatrix should * signify to Eyre and Bush, and appointed Eyre and Bush guardians to the children. "That the said Eyre and Bush proved the said will, and possessed themselves of all the real and personal estate, and placed out the plaintiff John Hill to a Roman Catholic school, to bring him up in that religion; and Frances was placed with the said Bush in order to be sent to school and brought up in the same religion; and the plaintiff Roger Hill, being advised in case the plaintiff John and Frances should be brought up in that religion, they might forfeit their legacies devised by their grandfather and grandmother, the plaintiff applied by petition to the Lord Chancellor, setting forth the matter, who directed Eyre and Bush, and John and Frances, to attend him." The bill then stated that his Lordship directed that Roger Hill should be guardian of the children, and directed an inquiry as to maintenance, and ordered Frances to be placed with a Protestant mistress, and John to live with his father, who consented to bring him up at St. Paul's school. That the master, under a reference directed by the same order, directed that Frances should be placed at Hackney, and that Roger Hill should apply to Eyre for money to clothe her and take her to school, but that Eyre refused it. That Eyre and Bush had prevailed on Anne Stevenson to make the above will, by which the real and personal estates were given away from the plaintiff John and directed to be sold, and that Eyre and Bush should dispose of the residue to such uses as Anne Stevenson should signify, which the plaintiffs had reason to believe were superstitious, or intended to be so. That notwithstanding the plaintiff, John, and his sister were under the care of this Court, yet Eyre and Bush took so little care of her that she was married to the defendant Richard Filkin about the 9th of August, 1717, in the Fleet Prison, or within the liberty of the prison of the Fleet, or some other place, without the previous consent of the said Eyre and Bush; but Filkin and his wife refused to discover when and where, and by whom, and in whose presence, they were first married, and

whether Eyre and Bush, or either of them, did at any time signify any consent to the first marriage, or any other marriage, between them, but instead thereof they were some time after married again in some other place, church, or chapel, without a license, and by a person not in holy orders according to the doctrine and discipline of the Church of England, or not qualified according to the laws to celebrate the office of matrimony, and were married a second time; and the said Eyre and Bush, or either of them, had not given any previous consent to such second marriage; and if they did at any time give any consent to or approbation of the marriage, they had, or were agreed, or been promised to have some gratuity or reward for such their consent or approbation of the marriage. That the plaintiff Roger had in a friendly manner applied to Eyre and Bush to have the residue of his wife's fortune, together with interest, paid according to the deed; and to have the legacy of 10*l.* given to the plaintiff John, and the 100*l.* secured, and to deliver to the plaintiff all his goods, his wife's

* clothes, linen, gold watch, diamond and other rings and things; but * 222 that to defeat the plaintiff of his wife's fortune, the defendants Eyre and Bush pretended that the plaintiff Roger had by some deed conveyed the same away for maintenance of the plaintiff John, and also pretended that the plaintiff Roger gave some note for 50*l.* to Stevenson, for which Eyre and Bush had brought their action, and were proceeding to judgment, though they were satisfied that if Stevenson did get any such note he never paid any consideration for it, and were so well satisfied that the same was not a real debt that they omitted it out of the account of the personal estate brought before the Master. "And, therefore, to have a performance of the said plaintiff Roger's settlement, and that the 200*l.* (part of the said plaintiff's late wife's portion) may be paid him with interest; and to have a discovery touching the marriage of the defendant Filkin with the defendant Frances, and to have an account of the estates of the said Francis and Anne Stevenson, and to have the plaintiff John Hill's legacy of 10*l.* and 100*l.*; and that the residue of the said Anne's estates may not go to superstitious uses, but be preserved for the plaintiff John and the defendant Frances; and that the defendants may deliver up to the plaintiff the said gold watch, rings, and clothes of his late wife, and to have the plaintiff Roger's note to be delivered up to be cancelled, and to be relieved, is the scope of the said plaintiffs Roger and John Hill's bill."

The defendants Eyre and Bush by their answer set forth various particulars as to the instruments which had been executed, but which for the present purpose it is unnecessary to notice. They said they were ready to pay the 10*l.* legacy when they could have a legal discharge, and the 100*l.* when John Hill attained twenty-one. They stated that in August then last a proposal of marriage having been made by Richard Filkin to Frances, they had made inquiry into his character and circumstances, and had approved of the marriage, and that no reward had been offered or insisted on for their consent. They further stated that Anne Stevenson had left no instructions with them concerning the residue of her estate, and that they never knew or heard of any private or other codicil made by her, disposing of any part of it to superstitious uses. That the marriage between Filkin and wife took place on the 25th of August, 1717, when they were married by Mr. Lucas, chaplain to the imperial resident, at his chapel;

but Filkin and wife admitted that they were afterwards married again within the rules of the Fleet by one Mr. Mottram, who appeared in the habit of a minister of the Church of England, "the defendant Filkin and his father (who are Protestants of the Church of England) thinking it proper that it should be so done."

The second suit was a cross suit instituted by Filkin and wife, to have the benefit of the settlement above referred to, and of some other deeds, and of the wills of Stevenson and his wife. By answer to this suit, "the defendant John

Hill, the infant, insists that the said wills of the said Francis Stevenson * 223 and Anne his wife shall be established, * and if the plaintiff Frances

Filkin his sister be taken to have married with the consent of the said trustees, then he is entitled to 10*l.* and interest by the will of the said Francis Stevenson, and 100*l.* by the will of the said Anne Stevenson; but if it shall not appear that she married with their consent, he is entitled to the whole residue of the said Anne Stevenson's estate." (a).

11 November, 1719. — A decree was made ordering that upon Roger Hill paying Bush and Eyre three guineas the promissory note should be cancelled, as having been obtained by fraud, only three guineas having been given for it. The decree proceeded to direct an account of what was due to Roger Hill in respect of his wife's portion, and an account of goods of his come to the hands of the defendants. The decree ordered the 10*l.* legacy to be invested for the benefit of John Hill, and security to be given for the payment of the 100*l.* legacy to him when it should become payable.

"And as to the residue of the said testatrix Anne Stevenson's personal estate, his Lordship was of opinion the said defendant Frances Filkin had done no act to forfeit the same, but as to the title now claimed by the said John Hill to the lands of the said Anne Stevenson as being next heir and a Protestant, and the said Frances Filkin being incapable to take as having professed the Popish religion, and being as insisted within the meaning of the Act made in the 11th year of his late Majesty King William, to prevent the further growth of Popery, it is ordered that the plaintiff John Hill, and the defendants Filkin and his wife, do proceed to a trial on these issues, viz.: Whether the defendant Frances Filkin was a person professing the Popish religion at the time the said Anne Stevenson, her grandmother, made her said will, and whether she was a person professing the Popish religion at the time of the death of the said Anne Stevenson, and whether she was a person professing the Popish religion at the time of her marriage. And it is hereby referred to the said Master to settle the said issues in case the parties differ therein." After trial "either party is to be at liberty to resort back to this Court, whereupon such further order shall be made as shall be just." Reserve costs, except certain costs which had been given to Roger Hill.

13 May, 1720. — The appeal to the House of Lords by Filkin and wife, reported 4 Bro. P. C. 640, was heard, and it was ordered, "That such part of the said decree complained of as directs the trial of the several issues therein

(a) This statement of the pleadings is abridged from the recitals in the decree of 1719. The record was found to be illegible.

mentioned be reversed, and that the now respondent in the original bill be at liberty to amend the said bill as to the several matters intended to be tried by the said issues, and that the said decree as to all other the matters complained of be affirmed."

The bill, as mentioned in the judgment of Lord Justice TURNER, appears to have been amended by order dated the 20th of July, 1720.

* An order was made on the 23d of April, 1722, on the hearing before * 224 Lord Macclesfield, reported 2 P. W. 6, in the recitals of which decree the point in dispute is thus stated: "The end of the plaintiff's bill being to have the opinion of the Court upon the will of Anne Stevenson, deceased, late grandmother of the plaintiff and defendant Frances, and whether the defendant Frances can take thereby, she having been brought up in the Romish religion, and the defendants by their answer insisting that the defendant Frances did soon after her intermarriage, and before she attained the age of eighteen years, openly and publicly forsake the Roman Catholic religion and become a Protestant, and hath ever since conformed in all things to the doctrine of the Church of England, and that therefore she was not incapable to take by the said devise." The order was to the effect that the plaintiff should be at liberty to amend his bill against Eyre and Bush, and by his amended bill to require them to set forth "how and on what occasion the marriage of the defendant Frances with the defendant Richard Filkin was had so soon after the making the said order of the 4th of March, 1716, for putting the defendant Frances to a Protestant schoolmistress, and what secret instructions they had from the said Anne Stevenson, grandmother of the plaintiff and defendant Frances, in relation to her grandchildren." Certain payments were directed out of the estate of Anne Stevenson; and it was ordered that when Eyre and Bush should have put in their answer to the amended bill, the cause should come on to be again heard, "at which time his Lordship declared he would desire the assistance of the Master of the Rolls and of the Judges." Reg. Lib. 1721, A. f. 231.

The cause and cross cause were heard before Lord KING on the 8th of June, 1725, 10 Mod. 536. In the title to the decree the name of Roger Hill occurs as next friend, but not as complainant. From the recitals it appears that the bill as amended charged as follows: "That the defendant Frances Filkin was a person educated in the Popish religion, and was a person professing the Popish religion on the 8th of May, 1716, when the said Anne Stevenson made her will, and was a person professing that religion at the said Anne's death in July, 1716, and that if she was married to the defendant Filkin she was at such marriage a person professing the Popish religion, whereby the residuum of the estate or money arising by the sale thereof or any trust thereof could not by law be vested in the said Frances or in the said Richard in her right, she being by the intention of the Act of Parliament made 11 Will. III., intituled 'An Act to prevent the growth of Popery,' made incapable to take the same, and the same descends to the plaintiff John, who is educated in the Protestant religion, and sincerely professes it." The case set up by Filkin and wife was that she had conformed to the Protestant religion before she attained the age of eighteen years. By the decree, the bill in *Hill v. Filkin* was dismissed without costs, and in the cross suit a decree was made for the administration of Anne Stevenson's estate.

* 225 * *Ex parte* SAMUEL BAGLEY RAWLINGS.

In the Matter of SAMUEL BAGLEY RAWLINGS, a Bankrupt.

1862. November 22, 24. December 6, 10. Before the LORDS JUSTICES.

A conditional assent on the part of a creditor to a deed intended to operate under the 192d section of the Bankruptcy Act, 1861, cannot, so long as the condition remains unfulfilled, be reckoned in calculating the statutory majority of creditors mentioned in the first of the conditions specified in that section.

Per L. J. KNIGHT BRUCE. — The question whether all those conditions have been complied with may be raised, notwithstanding the certificate of registration, and without setting it aside.

Per L. J. TURNER. — The 192d section extends to deeds of composition, although there may be no *cessio bonorum*. But the composition must be with all the creditors; and where a deed recited an agreement that sureties, parties to the deed, should pay the creditors a specified money composition to be accepted in discharge of the debts by instalments, and the delivery to the creditors, parties to the deed, of promissory notes for securing the instalments; and the creditors, parties to the deed, covenanted that the composition should be accepted in discharge of their respective debts, the amounts of which were specified in the schedule to the deed: *Held, per* L. J. TURNER, that the composition was not with all the creditors, there being no means afforded to non-assenting creditors of obtaining payment of the composition, or any note for securing such payment.

Per L. J. KNIGHT BRUCE. — Where there is only a doubt as to the validity of an adjudication, the proper course still is not to annul.

THIS was a motion on the part of Samuel Bagley Rawlings, the bankrupt, by way of appeal from an order of Mr. Commissioner GOULBURN, confirming an adjudication of bankruptcy against the appellant, and to have the adjudication annulled.

The petition for adjudication was filed on the 16th of October, 1862; the Act of Bankruptcy upon which it proceeded being the failure on the part of the appellant to pay, secure, or compound for a sum of 250*l.* 9*s.* 3*d.*, admitted by him on the 7th of the same month, under a trader-debtor summons, to be due from him to the respondents, the petitioning creditors.

The cause shown against the adjudication and the ground * 226 on which it was sought to annul it were, that on * the 11th of October, 1862, the bankrupt had executed a deed, which was in the following terms:—

" This indenture, made the 11th day of October, 1862, between Samuel Bagley Rawlings, of &c. of the first part; Martha Rawlings, of &c. and John Brown, of &c. of the second part; and the several persons whose names are contained in the schedule hereunder written, and who by themselves, their partners, or agents respectively, have executed these presents, being creditors of the said Samuel Bagley Rawlings, of the third part. Whereas the said Samuel Bagley Rawlings has for some time past carried on business as a maltster and corn, seed and coke merchant, at Oakham aforesaid, and now stands indebted to the several persons parties hereto of the third part in the several sums of money set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full; and whereas the said John Brown is a large creditor of the said Samuel Bagley Rawlings, and it has been agreed by and between the several persons, parties to these presents, that the said Martha Rawlings and John Brown shall pay to the several creditors of the said Samuel Bagley Rawlings a composition of 7s. 6d. in the pound on the amount of their respective debts, which is to be accepted by them in full satisfaction and discharge of the same debts, and that such composition should be paid by three equal instalments of 2s. 6d. each at the several periods following (that is to say), the first of such instalments at the expiration of three months from the date hereof; the second of such instalments at the expiration of six months from the date hereof; and the last of such instalments at the expiration of nine months from the date hereof, and be secured by the joint and several promissory notes of the said Samuel Bagley Rawlings, Martha Rawlings, and John Brown; and whereas the said * promissory notes have been respectively * 227 delivered to the several creditors of the said Samuel Bagley Rawlings, parties hereto of the third part, at the time of the execution of these presents by the said creditors respectively, as they the said creditors do hereby severally acknowledge and declare; and whereas, in order to enable the said Martha Rawlings and John Brown to meet the said promissory notes, it has been agreed by and between the several parties hereto, that all the stock in trade, moneys, trade effects, and all other the estate and effects whatsoever of the said Samuel Bagley Rawlings shall be assigned unto the said Martha Rawlings and John Brown in manner here-

inafter expressed: Now this indenture witnesseth, that in pursuance of the said agreement and for effectuating the same, and in consideration of the premises and of 10s. sterling to the said Samuel Bagley Rawlings now paid by the said Martha Rawlings and John Brown, the receipt whereof is hereby acknowledged, he the said Samuel Bagley Rawlings, with the full consent and approbation of the said creditors (testified by their severally executing these presents), doth hereby bargain, sell, assign, transfer, and set over, and the said creditors do hereby severally so far as they may or can ratify and confirm, unto the said Martha Rawlings and John Brown, their executors, administrators, or assigns, all the stock in trade, money, credits, securities, goods, merchandise, books, books of account, and all other the estate and effects whatsoever and wheresoever of or belonging to his said trade or business, and all other the estate and effects of the said Samuel Bagley Rawlings whatsoever (the wearing apparel of himself only excepted), and all the title, interest, possession, claim, and demand whatsoever and howsoever of the said Samuel Bagley Rawlings

therein and thereto, to have, hold, receive, and take the * 228 said estate and effects * and premises hereinbefore assigned or intended so to be unto and by the said Martha Rawlings and John Brown, their executors, administrators, and assigns. And the said Samuel Bagley Rawlings doth hereby constitute and appoint the said Martha Rawlings and John Brown, their executors, administrators, and assigns, the true and lawful attorneys, irrevocable, of him the said Samuel Bagley Rawlings, his executors and administrators, to ask, demand, sue for, recover, and receive the debts, moneys, and premises hereby assigned or intended so to be, and on payment or delivery thereof, or of any part thereof respectively, in the name of the said Samuel Bagley Rawlings, his executors or administrators, to give good and effectual receipts and discharges for the same; and also in his or their name to adjust or settle all accounts and transactions whatsoever relating to the said hereby assigned premises, as fully and effectually to all intents and purposes as he the said Samuel Bagley Rawlings, his executors or administrators could have done if these presents had not been executed. And in consideration of the premises, they the said creditors parties hereto of the third part, do hereby for themselves severally and respectively, and for their

several and respective heirs, executors, and administrators, covenant and agree to and with the said Martha Rawlings and John Brown, their executors and administrators, and also separately with the said Samuel Bagley Rawlings, his executors and administrators, that the said composition so agreed to and secured as aforesaid shall be, and the same is hereby taken and accepted by them, the said creditors respectively, in full satisfaction and discharge of their several and respective debts and demands against the said Samuel Bagley Rawlings, the full amount of which said debts and demands are set opposite to the respective names of the said creditors executing these * presents in the * 229 schedule hereunder written. And the said Samuel Bagley Rawlings doth hereby for himself, his heirs, executors and administrators, covenant and agree with the said Martha Rawlings and John Brown, their executors and administrators, that he the said Samuel Bagley Rawlings, his executors or administrators, will at the request and expense of the said Martha Rawlings and John Brown, their executors or administrators, do and execute all such further acts and deeds as may be necessary for better or more satisfactorily assigning or otherwise assuring the effects and premises hereby assigned unto the said Martha Rawlings and John Brown, their executors, administrators and assigns, according to the true intent and meaning of these presents, as by the said Martha Rawlings and John Brown, their executors, administrators, or assigns shall be reasonably required. Provided always, and it is hereby declared, that any creditor who has any bill or bills of exchange or other security, for the payment whereof the said Samuel Bagley Rawlings and any other person or persons is or are liable, either as drawer, acceptor, or indorsee, may execute these presents without prejudice to his claim against any other person or persons liable thereto in like manner as under an adjudication in bankruptcy. In witness," &c.

None of the appellant's creditors actually executed this deed, it being executed only by himself and the parties of the second part. The latter did not take possession of any of the property comprised in it, of which the appellant could have given or ordered possession.

According to the account of debts delivered together with the

deed to the chief registrar in obedience to the General
 * 230 Orders in Bankruptcy of the 22d of May, * 1862, (a) it

(a) The material sections of the Acts of 1849 and 1861, and other matters, to which the arguments in the present and several of the following cases had reference, are as follows :—

Bankrupt Law Consolidation Act, 1849, §§ 224, *sqq.*

“ And with respect to arrangements by deed, be it enacted,

“ CCXXIV. That every deed or memorandum of arrangement now or hereafter entered into between any such trader and his creditors, and signed by or on behalf of six-sevenths in number and value of those creditors whose debts amount to ten pounds and upwards, touching such trader's liabilities, and his release therefrom, and the distribution, inspection, conduct, management, and mode of winding-up of his estate, or all or any of such matters, or any matters having reference thereto, shall (subject to the conditions hereinafter mentioned) be as effectual and obligatory in all respects upon all the creditors who shall not have signed such deed or memorandum of arrangement as if they had duly signed the same; and such deed or memorandum, when so signed, shall not be or be liable to be disturbed or impeached by reason of any prior or subsequent Act of Bankruptcy: Provided always, that every creditor shall be accounted a creditor in value in respect of such amount only as, upon an account fairly stated, after allowing the value of mortgaged property and other such available securities or liens from such trader, shall appear to be the balance due to him.

“ CCXXV. That no such deed or memorandum of arrangement shall be effectual or obligatory upon any creditor who shall not have signed the same, until after the expiration of three months from the time at which such creditor shall have had notice from such trader of his suspension of payment, and of such deed or memorandum of arrangement, unless such trader shall within such time obtain from the Court an order or certificate of the said Court declaring or certifying that such deed or memorandum of arrangement has been duly signed by or on behalf of such majority of the creditors as aforesaid; and it shall be lawful for the Court within the district of which the trader shall have resided or carried on business for six months next immediately preceding his suspension of payment to make such order or certificate on the petition of any such trader, and to exercise jurisdiction in and over the matters of any such application; and no creditor who shall not have had fourteen days' notice of any intended application for such order or certificate as aforesaid shall be bound thereby.

“ CCXXVI. That when the trustee or inspector under any such deed or memorandum of arrangement, or, if there shall be no such trustee or inspector, when any two of the creditors, shall be satisfied that six-sevenths in number and value of the creditors whose debts amount to ten pounds and upwards have signed such deed or memorandum, it shall be lawful for such trustee or inspector, or for such two creditors, as the case may be, to certify the same to the Court in writing, and such certificate shall be filed with the registrar of the Court, and shall thereupon be *prima facie* evidence in all Courts of Law and Equity that such deed or memorandum of arrangement has been so signed.

appeared that the total number of creditors * was twenty- * 231
 six, of whom sixteen assented, and ten did * not ; that the * 232

“CCXXVII. That every such certificate as last aforesaid shall have appended thereto a full account of the debts of such trader, together with the names, residences, and occupations of his creditors, and shall be accompanied by an affidavit by such trader verifying the same; and any omission in such account or the insertion therein of any debt not really existing, or of any larger amount of debt than that really existing, and which shall appear to the Court to have been made through the culpable negligence or fraud of such trader, with intent to defraud any of his creditors, shall deprive him of the benefit of the provisions of this act with respect to arrangements by deed, and of the discharge proposed in any such deed or memorandum of arrangement: provided always; that any omission, insertion, or incorrectness in such account which shall not have been made through such culpable negligence or fraud as aforesaid, shall not defeat or otherwise affect such deed or memorandum of arrangement.

“CCXXVIII. That the creditors of every such trader shall have the same rights respectively as to set-off, mutual credit, lien, and priority, and joint and separate assets shall be distributed, in like manner as in bankruptcy; and no creditor shall be prejudiced or affected by being a party to any such deed or memorandum of arrangement as aforesaid, or by the same being obligatory upon him as to his right or remedy against any person other than such trader; and every person who would be entitled to prove in bankruptcy shall be deemed a creditor within the meaning of the provisions of this Act with respect to arrangements by deed.

“CCXXIX. That if any creditor of any trader shall be desirous to show that the administration of the estate of such trader has not been duly conducted in conformity with such deed or memorandum of arrangement, it shall be lawful for him to apply to the Court by petition, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted, and thereupon the Court shall have full power and it is hereby fully authorized to consider the subject-matter of such application, and if it shall think fit may direct any inquiry, and in such manner as it shall think proper, into the subject of such application, and generally may make such order and exercise such jurisdiction in or over the subject-matter of such application and the costs thereof as to the said Court shall appear just.”

The Bankruptcy Act, 1861, §§ 192, *sqq.* are as follows:—

“As to trust-deeds for benefit of creditors, composition and inspectorship deeds executed by a debtor.

“192. Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor, as if they were parties to and had duly executed the same, provided the following conditions be observed: that is to say, —

“1. A majority in number representing three-fourths in value of the cred-

- * 233 total amount of debts was 4949*l.* 5*s.* 2*d.*, * three-fourths
 * 234 of which amount was 3711*l.* 18*s.* 10½*d.*; * and that the

itors of such debtor whose debts shall respectively amount to ten pounds and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of such deed or instrument:

" 2. If a trustee or trustees be appointed by such deed or instrument, such trustee or trustees shall execute the same:

" 3. The execution of such deed or instrument by the debtor shall be attested by an attorney or solicitor:

" 4. Within twenty-eight days from the day of the execution of such deed or instrument by the debtor the same shall be produced and left (having been first duly stamped) at the office of the chief registrar, for the purpose of being registered:

" 5. Together with such deed or instrument there shall be delivered to the chief registrar an affidavit by the debtor or some person able to depose thereto, or a certificate by the trustee or trustees, that a majority in number, representing three-fourths in value, of the creditors of the debtor whose debts amount to ten pounds or upwards have in writing assented to or approved of such deed or instrument, and also stating the amount in value of the property and credits of the debtor comprised in such deed:

" 6. Such deed or instrument shall, before registration, bear such ordinary and *valorem* stamp duties as are hereinafter provided:

" 7. Immediately on the execution thereof by the debtor, possession of all the property comprised therein, of which the debtor can give or order possession, shall be given to the trustees.

" 193. The date, names, and descriptions of the parties to every such deed or instrument, not including the creditors, together with a short statement of the nature and effect thereof, shall be entered by the chief registrar in a book to be kept exclusively for the purposes of such registration. Such entry shall be made within forty-eight hours after the deed shall have been left with the registrar as aforesaid, and a copy of such entry shall be published in the London Gazette within four days after the making of such entry.

" 194. Every deed, instrument, or agreement whatsoever, by which a debtor, not being a bankrupt, conveys or covenants or agrees to convey his estate and effects, or the principal part thereof, for the benefit of his creditors, or makes any arrangement or agreement with his creditors, or any person on their behalf, for the distribution, inspection, conduct, management, or winding up of his affairs or estate, or the release or discharge of such debtor from his debts or liabilities, shall, within twenty-eight days from and after the execution thereof by such debtor, or within such further time as the Court in London shall allow, be registered in the Court of Bankruptcy; and in default thereof shall not be received in evidence.

" 195. No deed or instrument whatever required to be registered as aforesaid shall be registered unless, in addition to the ordinary stamp duty, it also be impressed with or have affixed to it a stamp denoting a duty computed at the rate of five shillings upon every hundred pounds, or fraction of an hundred

aggregate value of the debts of the sixteen assenting creditors was 430*l.* 12*s.* 2*d.*

pounds, of the sworn or certified value of the estate or effects comprised in, or to be collected or distributed under, such deed or instrument: Provided, that the maximum of *ad valorem* duty payable in respect of any such deed or instrument shall be two hundred pounds.

“ 196. Every such deed, on being so registered as aforesaid, shall have a memorandum thereof written on the face of such deed, stating the day and the hour of the day at which the same was brought into the office of the chief registrar for registration.

“ 197. From and after the registration of every such deed or instrument in manner aforesaid, the debtor and creditors, and trustees, parties to such deed, or who have assented thereto or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this Act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy; and except where the deed shall expressly provide otherwise, the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy.

“ 198. After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court shall be available to the debtor for all purposes as a protection in bankruptcy.

“ 199. In case any petition shall be presented for an adjudication in bankruptcy against a debtor after his execution of such deed or instrument as is hereinbefore described, and pending the time allowed for the registration of such deed or instrument, all proceedings under such petition may be stayed, if the Court shall think fit; and in case such deed or instrument shall be duly registered as aforesaid, the petition shall be dismissed.

“ 200. If a debtor cannot obtain the assent of a majority in number representing three-fourths in value of his creditors, by reason of his being unable to

* 235 * Among the assenting creditors, however, were placed the names of Messrs. Eaton, Cayley, & Co., bankers of Stamford, as unsecured creditors for 1400*l.*, with the following note appended:—

“They hold the bond of Mrs. Rawlings for 200*l.*, and of Mr. Bennett for 500*l.* and a policy for 1000*l.* on my life, but claim to be entitled to the composition upon the whole debt.”

ascertain by whom bills of exchange, promissory notes, or other negotiable securities accepted, drawn, made, or endorsed by him are holden, or by reason of the absence of creditors in a foreign country, or other similar circumstances, it shall be sufficient if he obtain the consent of a majority in number representing three-fourths in value of all his other creditors to such deed or instrument as aforesaid; provided that notice shall have been inserted by or on behalf of the debtor in one or more newspapers published in the county or place at which he shall have carried on business immediately prior to the date of such deed or instrument, requiring his creditors to signify their assent to or dissent from such deed or instrument by notice in writing addressed to the trustee or trustees thereof within fourteen days from the insertion of such notice, and that the affidavit or certificate of the trustee or trustees shall state the circumstances of the case, and the same shall be allowed by the Court, and provided the deed or instrument be in such form as is expressed in schedule (D.) to this act annexed, which shall vest all the estate and effects of the debtor in the trustees of such deed, and provided that all such other conditions as are hereinbefore required be duly complied with.”

The scheduled form referred to in the last of these sections is the following:—

“This deed made the — day of — between A. B. [the debtor] and C. D. and E. F. [the trustees] on behalf and with the assent of the undersigned creditors of A. B., witnesseth that A. B. hereby conveys all his estate and effects to C. D. and E. F. absolutely, to be applied and administered for the benefit of the creditors of A. B. in like manner as if A. B. had been at the date hereof duly adjudged bankrupt. In witness, &c.

“Schedule of creditors.”

The General Order of the 22d of May, 1862, referred to in the text and during the arguments of the present and several of the subsequent cases, is, so far as it is material, with the schedule appended to it, as follows:—

“1. Together with every deed or instrument left, after the fifth day of June next, at the office of the chief registrar, for the purpose of being registered under sect. 192 of the Bankruptcy Act, 1861, and in addition to the affidavit or certificate required to be delivered to the chief registrar under the 5th condition of the said section, there shall be delivered to the chief registrar a copy of such deed or instrument, certified by the attorney or solicitor attesting the execution of the same by the debtor, to be a true copy, and also, and as near as may be, in the form in the schedule hereunder written, a full account of the debts of the debtor, which shall respectively amount to 10*l.* and upwards, together with the

* The deed accompanied by this account of debts and * 236 also by an affidavit of the appellant, sworn on the 11th of October, 1862, that a majority in number representing three-fourths in value of his creditors whose debts amounted to 10*l.* or upwards, had in writing assented to or approved of the deed, and otherwise in * accordance with the requirements * 237

names, in alphabetical order, and the residences of his creditors, distinguishing those who have, in writing, assented to or approved of the deed, and such account shall be accompanied with an affidavit by such debtor verifying the same."

" SCHEDULE.

" THE BANKRUPTCY ACT, 1861.

" *Form of the Account to be delivered to the Chief Registrar with Trust Deed, Composition or Inspectorship Deed. Sect. 192.*

" N.B. — This is to be an account to the best of the debtor's knowledge, information, and belief, of all the debts of the debtor¹ which shall respectively amount to 10*l.* and upwards, and including debts secured and showing the estimated value of any security.

" A full account of the debts of amounting to 10*l.* and upwards, together with the names and residences of his creditors, to the best of his knowledge, information, and belief.

No.	Names and Residences.	If Assenting.	Secured.		Unsecured.	Nature of Security.
			Amount.	Value or estimated Value of the Security to be deducted.	Amount.	
			£ s. d.	£ s. d.	£ s. d.	
1	Anderson, John, 5, Fore Street, London, Brush Maker,	Assenting	1200 0 0	450 0 0	750 0 0	Mortgage dated 1st July, 1861, of two freehold houses at Hendon, for securing 600 <i>l.</i> —The estimated value is the Security of 450 <i>l.</i>
2	Hopkinson, Joseph, 65, Cornhill, London, Jeweller,	—	—	—	380 0 0	
3	Watson, Henry, 45, Strand, London, Grocer.	Assenting	—	—	200 0 0	

No. of Creditors 36	Amount of Debts $\frac{1}{2}$ / £24,000	Amount of Debts of Creditors Assenting £21,300
Assenting 20	6,000	
Not Assenting . . 16	8	
— 36	£18,000	

¹ In cases of partnership all the debts of the partnership and the separate debts of each partner are to be given in separate lists.

of the fifth of the conditions specified in the 192d section of the Bankruptcy Act, 1861, was delivered to the chief registrar, and the deed was registered on the 13th of October, 1862, and a certificate of registration delivered to the appellant.

The commissioner thought the 198th section of the Bankruptcy Act, 1861, had no application to this state of circumstances, and afforded no bar to the proceedings in bankruptcy, and from this decision the appellant, having been adjudged bankrupt, appealed.

Mr. Bacon and *Mr. Ernest Reed*, for the appellant.—The certificate of registration of the deed is conclusive evidence that the formalities required by the statute in order to render it binding upon all the appellant's creditors have been fulfilled. The question, therefore, is whether or not this is such a deed as is within the meaning of the 192d and following sections of the Bankruptcy Act, 1861, and we submit that it is. The only cases in which there has been any discussion of the enactment contained in these sections, so far as the essentials of a deed intended to operate under them are concerned are those of *Walter v. Adcock*, (a) and *In re Castleton*. (b) In the former of those cases, some of the learned Barons of the Exchequer seem to have considered themselves at liberty to speculate upon the intentions, rather than bound to interpret the language, of the legislature, and in a position to adjudicate upon the general requisites to the validity of deeds intended to operate under the sections in question, rather than called upon to express an opinion upon the terms of the particular deed before them. And in respect of that case,

we submit that the opinion of Mr. Baron WILDE is more
 * 238 * correct than those of the Lord Chief Baron and Mr.

Baron MARTIN. *In re Castleton* seems to show that your Lordships, when that case was argued, entertained the same view. With the exception of these two cases, the question may be said to be really unaffected by authority, and must be discussed on general principles; and the plain language of the legislature, when so dealt with, clearly admits within its scope composition deeds, providing for the release of a debtor upon the payment of a composition upon his debts.

The words “and the distribution, inspection, conduct, manage-

(a) 7 H. & N. 541.

(b) 31 L. J. N. S. Bank. 71.

ment and mode of winding-up of his estate," contained in the now repealed 224th section of the Bankrupt Law Consolidation Act, 1849, were made the ground-work of a decision of the Court of Exchequer Chamber in *Tetley v. Taylor*, (a) subsequently followed in *Ex parte Wilkes* (b) and other cases, that a deed to be a valid deed of arrangement under that section, and as such binding upon non-assenting creditors, ought to provide for the absolute distribution of all the debtor's property in all events amongst all his creditors as in bankruptcy. But the language of the 192d section of the Act of 1861 affords no similar ground-work, and indeed expressly excludes the possibility of its existence, by the change advisedly made (during the passage of the bill into law) of the words just cited from the 224th section of the Act of 1849 into the words "or the distribution, inspection, management and winding-up of his estate" in the 192d section of the Act of 1861.

Even therefore were it admissible, as we submit it is not, to look to the repealed sections of the Act of 1849 for an analogy to guide us in construing the enactment * contained in the * 239 Act of 1861, the decisions based upon the language of the former act would have no application to cases arising under the new statute. Indeed, the provisions of the Act of 1849, as construed by judicial interpretation, excluded composition deeds from their scope, and so frustrated the objects for which they were introduced; and it was the policy of the legislation of 1861 in this respect to repair the consequences of the interpretation judicially placed upon the former enactment. The whole scope of the later Act is to enlarge the powers of creditors, and to extend the range of the clauses relating to amicable arrangements between them and their debtors; as clearly appears, for example, from a comparison of the limited provision for change from bankruptcy to arrangement afforded by the 230th section of the Bankrupt Law Consolidation Act, 1849, (c) with * the twofold and liberal * 240

(a) 1 El. & Bl. 532.

(b) 5 De G., M. & G. 418.

(c) Which with its heading and auxiliary section 231 is as follows:—

"And with respect to composition after adjudication of bankruptcy, be it enacted,

"CCXXX. That any bankrupt at any time after he shall have passed his last examination may call a meeting of his creditors (whereof and of the purport whereof twenty-one days' notice shall be given in the London Gazette), and if the bankrupt or his friends shall make an offer of composition, and nine-tenths in number and value of the creditors assembled at such meeting shall agree to

enactments for the same purpose contained in the 110th
 * 241 and the 185th and following sections * of the Act of 1861;

accept the same, another meeting for the purpose of deciding upon such offer shall be appointed to be holden, whereof such notice shall be given as aforesaid, and if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the Court shall and may, upon such acceptance being testified by them in writing, and upon payment of such sum as the Court shall direct, annul the adjudication of bankruptcy, and supersede or dismiss the *flat* or petition for adjudication, and every creditor of such bankrupt shall be bound to accept of such composition so agreed to.

"CCXXXI. That in deciding upon the offer of composition no creditor whose debt is below twenty pounds shall be reckoned in number, but the debt due to such creditor shall be computed in value; and every creditor to the amount of fifty pounds and upwards residing out of England shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called so long before such meeting as that he may have time to vote thereat, and such creditor shall be entitled to vote by letter of attorney, executed and attested in manner required for a creditor's voting in the choice of assignees; and if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition; and the bankrupt shall (if thereto required) make oath before the Court that there has been no such transaction between him, or any person with his privity, and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent."

By the 109th and 110th sections of the Bankruptcy Act, 1861, it is enacted as follows:—

"109. As soon as conveniently may be after adjudication shall have become absolute, the Court shall appoint a meeting of the creditors, of which ten days' notice shall be given in the London Gazette, and which meeting shall be held at such time and place as the Court shall appoint. . . .

"110. In case at such meeting or at any other meeting of creditors any proposal shall be made by or on behalf of the bankrupt which it shall appear to the major part in value of the creditors then present ought to be accepted, or if it shall appear to the majority in value of the creditors present at any meeting to be desirable on any ground to resolve, and such majority shall resolve, that no further proceedings be taken in bankruptcy, the meeting shall be adjourned for fourteen days, in order that notice of such resolution may be given to every creditor by the official or creditors' assignee, which shall be done accordingly; and if at such adjourned meeting a majority in number representing three-fourths in value of the creditors present shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct, and the bankrupt having made a full discovery of his estate shall be entitled to apply for an order of discharge."

or again from a comparison of the restricted descriptions for the validity of deeds of *arrangement which alone were * 242 held to be effectual under the 224th section of the former

The 185th and following sections of the Act of 1861 with their headings are respectively as follows :—

“ As to change from bankruptcy to arrangement :

“ 185. At the first meeting of creditors held after adjudication in manner herein provided, or at any meeting to be called for the purpose, and of which ten days' notice shall have been given in the London Gazette, three-fourths in number and value of the creditors present or represented at such meeting may resolve that the estate ought to be wound up under a deed of arrangement, composition, or otherwise, and that an application shall be made to the Court to stay proceedings in the bankruptcy for such period as the Court shall think fit.

“ 186. The registrar shall report such resolution to the Court within four days from the date of such resolution; and the bankrupt, or any creditor nominated in that behalf by the meeting, may then apply to the Court that the proceedings in bankruptcy may be stayed in the terms of such resolution; and the Court, after hearing the bankrupt, and such creditors as may desire to be heard for or against the resolution, and if it shall find that the resolution was duly carried, and that its terms are reasonable, and calculated to benefit the general body of the creditors under the estate, shall confirm the same, and make order accordingly, and in such order shall give such directions as to the interim management of the estate as it shall deem expedient.

“ 187. If the proceedings in bankruptcy be stayed as herein provided, the bankrupt, or any creditor nominated in that behalf by the meeting aforesaid, may, at any time within the period during which the proceedings are so stayed, produce to the Court a deed of arrangement, signed by or on behalf of three-fourths in number and value of all the creditors of the bankrupt; and the Court may consider the same, and may examine on oath the bankrupt and any of the creditors who may desire to be heard in support of or in opposition to the deed, and may make such other inquiry as it may think necessary; and if the Court shall be satisfied that the deed has been duly entered into and executed, and that its terms are reasonable and calculated to benefit the general body of the creditors under the estate, it shall by order make a declaration of the complete execution of the deed, and shall direct the same to be registered with the chief registrar, and shall also, if it thinks fit, annul the bankruptcy; and such deed shall thereafter be as binding in all respects on any creditor who has not executed the deed as if he had executed it, provided such deed be registered with the chief registrar in manner directed by the order.

“ 188. Either before or after such order, the Court shall have jurisdiction to entertain any application of the bankrupt, or of any party to the deed, or of any creditor or person claiming to be a creditor, respecting the disclosure, distribution, inspection, conduct, management, or winding-up of the bankrupt's estate and affairs, or any act or thing relating thereto, or respecting the execution of any of the trusts or provisions of the deed, or the audit or examination of the accounts of a trustee or inspector, or the taxation or examination of the costs or

Act, with the wider scope allowed by the terms of the 192d * 243 and following sections of * the Act of 1861. Such then being the policy governing the introduction of the 192d and following sections of the last-mentioned Act, does their language or not carry into effect the presumable objects of its framers? We submit that it does. The heading which is prefixed to these sections as contrasted with that prefixed to the 224th and following sections of the Act of 1849, clearly includes within its ambit deeds providing for the release of debtors upon the payment of a money

charges of any attorney, solicitor, accountant, auctioneer, broker, or other person acting or employed under the deed, or generally for the decision of any dispute or question, and shall also have jurisdiction to entertain any application of any such person as aforesaid, respecting any matter for the submission whereof to the Court provision is made by the deed, or any matter arising between any of the said persons, and any other person appearing and submitting to the jurisdiction of the Court; and the Court shall determine all questions arising under the deed according to the law and practice in bankruptcy, so far as they may be applicable, and on entertaining any such application shall have power to make all such orders as shall seem just, and to enforce all such orders as in bankruptcy.

" 189. The Court shall have power, for the purpose of any application under these provisions, or for the better execution of any powers given to the Court thereby, to summon, and to examine, upon oath or otherwise, the bankrupt, and any party to the deed, and any creditor or person claiming to be a creditor, and any person known or suspected to have any of the estate in his possession, or any person supposed to be indebted to the estate, or whom the Court may deem capable of giving any information material to the full disclosure of the debtor's transactions and affairs, or to the carrying into effect the provisions of the deed; and the Court may exercise, as to the examination of such persons, and the production by them of such books, papers, deeds, or documents as it shall deem requisite, the same powers that are vested in the Court with relation to the examination of persons and witnesses, and the production of books, papers, deeds, and documents, in matters of bankruptcy.

" 190. If the resolution aforesaid shall not be duly reported, or if the Court shall refuse the application to stay proceedings, or if the deed of arrangement shall not be duly produced, or if upon its production the Court shall not think fit to approve thereof, the bankruptcy shall proceed as though no such resolution had been passed; and the Court may make all necessary orders for resuming the proceedings in bankruptcy, and the period of time which shall have elapsed between the date of such resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this Act.

" 191. If the bankruptcy be annulled, as herein provided, the order annulling the same shall be filed with the proceedings, and notice thereof shall be given in the London Gazette."

composition under which they retain possession of their property, equally with trust-deeds which contemplate a cession of property to trustees for the benefit of the debtors' creditors, and with inspectorship deeds under which, as in the case of composition deeds, the debtors retain the control of their property, although subject to inspection. The guarded language of the second and seventh conditions specified in the 192d section shows, as do also the words "every deed" in that section itself, referring as they clearly do to every deed of either of the classes mentioned in the preceding heading, that the legislature in passing this enactment had it in contemplation to extend its benefits to deeds which should not affect property belonging to debtors, as indeed might have been expected to be done in an Act which fuses the proceedings in insolvency with those in bankruptcy, and therefore brings within its provisions (as by its 98th and 99th sections) debtors who have no property. Even the language of the 194th section shows that the legislature contemplated the existence of cases in which the whole of the debtor's property might not be dealt with. The deed in * the present case is not nor was meant to be a trust *244 deed. There is no trust created, no trustee, no assignment. To it consequently such of the conditions specified in the 192d section as point to deeds which deal with the debtor's property, and among them the 7th condition, are inapplicable. But as a composition deed of the nature contemplated by the Act, we submit that it is valid by virtue of the Act, and binding upon all the appellant's creditors.

[THE LORD JUSTICE KNIGHT BRUCE. — Would the course of proceeding which in the case of *Ex parte Bower* (a) was held to be right under the Act of 1849, be wrong under the Act of 1861?]

Mr. Bacon. — Such a course of proceeding would be impracticable here, as the composition deed could not be set up at law against the title of assignees under the adjudication.

They also referred to *Re Shettle*, (b) before Mr. Commissioner HOLROYD.

(a) 1 De G., M. & G. 468, 475. See also *Ex parte Burnett*, 4 De G. & S. 54.

(b) 11 W. R. 45.

Mr. Giffard and *Mr. Clements Swanston*, for the respondents. — It was not competent for the appellant, having admitted the respondents' demand under the 79th and 81st sections of the Act of 1849, to take advantage within the seven days mentioned in the 81st section of the provisions contained in the 192d and following sections of the Act of 1861 against the respondents. The *245 principles which guided this Court in the cases of * *Ex parte Walker* (a) and *Ex parte Dales* (b) are applicable to the present case. Moreover, the proceedings initiated by the respondents are attempted to be stayed by the execution of this deed, with, as it is alleged, the due fulfilment of all the conditions imposed by the statute. The *onus* is upon the appellant of affirmatively proving this allegation; and to produce simply the certificate of registration, and his own affidavit upon which that certificate was founded, is not enough. The assents of the creditors who are alleged in that affidavit to have in writing assented to or approved of the deed should be produced.

[THE LORD JUSTICE KNIGHT BRUCE. — Speaking only for myself, I think that you are entitled to have the assents produced, or their absence accounted for.]

[Upon this intimation of opinion of the Lord Justice, the assents were produced on the part of the appellant. It appeared thereby that, with respect to the assent of Messrs. Eaton, Caley, & Co., those creditors on the 27th of October, 1862, gave through their solicitors, Messrs. Thompson & Phillips, merely an assent conditional upon the creditors being unanimous, which was exchanged, but not until the 30th of October, 1862, for an unconditional assent; and that, consequently, the affidavit of the debtor made on the 11th of that month was incorrect, in so far as it referred to Messrs. Eaton, Caley, & Co. as assenting creditors at that time; and that although the unconditional assent of these creditors was obtained before the expiration of the twenty-eight days mentioned in the fourth condition specified in the 192d section, such assent was not obtained within the forty-eight hours mentioned in the 193d section.]

(a) 6 De G., M. & G. 752.

(b) 2 De G. & J. 206.

* The certificate of registration, then, it appears was given, * 246 although the registrar was powerless to do otherwise than give it, on a false assumption of facts, which the production of these assents makes clear; and we are entitled to remove the names and debt of Messrs. Eaton, Cayley, & Co. from the list of assenting creditors.

[THE LORD JUSTICE TURNER. — Must you not apply to discharge the registration ?]

We submit not; the Act gives effect to the deed, subject to the performance of the conditions imposed; and it is incumbent on the appellant moving here to stay proceedings in bankruptcy to support his case by all proper affirmative evidence. Removing, then, these names and this debt, we have a majority of fifteen assenting to ten non-assenting creditors, and representing in value the sum of 2904*l.* 12*s.* 2*d.* only, less than the majority in value required by the statute. But even if we are not entitled to production of the assents, and the certificate of registration is to be assumed to be conclusive so long as the registration itself remains unimpeached, still the assent must be reckoned as extending only to the balance of the amount due to these creditors, after deduction of the value of the securities held by them. This is clear from the form of the schedule to the order of the 22d of May, 1862, which order being made under the authority of the 45th and 47th sections of the Act of 1861, (a) must * have due * 247

(a) The schedule to the order referred to is set out above, p. 236, note. The sections of the Act referred to are respectively as follows: —

“45. The Lord Chancellor shall, with the assistance of two commissioners, and subject to the provisions of this Act, frame general orders for the following purposes: —

“For regulating the practice and procedure of the Courts of Bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in the said Courts, in all matters under this Act;

“For regulating the duties of the various officers of such Courts;

“For regulating the fees payable and the charges and costs to be allowed with respect to all proceedings before such Courts, and before the County Courts acting in bankruptcy;

“For regulating the practice and procedure upon appeals;

“For regulating the filing, custody, and inspection of records;

“And, generally, for carrying the provisions of this Act into effect.

“47. After such general orders shall have been so framed they or any of

weight attributed to it in construing the Act itself. This appears also from the 97th section of the Act. (a) That section applies, it is true, in strictness only to the computation of debts for the purposes of petitions under the Act; but the legislature must have intended a similar course of procedure to be followed in cases of arrangements by deed, the object of which was to provide for an administration as in bankruptcy, but without the necessity of actual resort to the Court of Bankruptcy; and that no creditor should come in under a deed of arrangement who could not also come in under a bankruptcy. The statutory form of deed too given in the schedule (D.) to the Act clearly recognizes the principle that the administration must be in all respects as in bankruptcy. It follows, therefore, that creditors coming in under a deed must come in only for such part of their debts as would be provable in the case of an actual bankruptcy, that is, for the whole

amount *minus* the value of securities held by them. Now,
 * 248 it appears that Messrs. Eaton, Cayley, & Co. are * creditors for 1400*l.* and hold securities amounting in the aggregate to 1700*l.* Even therefore if they are to be retained amongst the assenting creditors in point of number, the amount of their debt must be entirely removed from the computation of the amount in value of the debts of assenting creditors, and the statutory majority is not made up.

On any of these grounds, therefore, the appeal must fail. We submit, however, that it must fail equally on general grounds. It would be strange if a deed such as this should be held within the protection of the 192d and following sections of the Bankruptcy Act, 1861. It is a deed which not only is expressed to be made

them may be rescinded or varied, and other general orders may be framed in manner aforesaid. . . .”

(a) Which enacts as follows:—

“97. In the computation of debts for the purposes of any petition under this Act there shall be reckoned as debts,—

“1. Sums due to creditors holding mortgages or other available securities or liens; after deducting the value of the property comprised in such mortgages, securities, or liens:

“2. Such interest and costs as shall be due in respect of any of the debts:

“But there shall not be reckoned,—

“1. The amount of the debts in respect of which the petitioner has already taken the benefit of insolvency, protection, or bankruptcy:

“2. Debts barred by any statute of limitations.”

with and for the benefit of those creditors only who have executed it (a thing which no creditor has in fact done), but which, by its form and by the effect of its recitals, showing the relative positions of John Brown and the appellant, and the object of the assignment made by the deed to Martha Rawlings and John Brown, creates an irrevocable trust in those persons of the property assigned to them for the benefit of the appellant's creditors. The omission, therefore, on the part of Martha Rawlings and John Brown to take possession of the property comprised in the deed, is in contravention of the seventh condition of the 192d section, and the deed consequently out of the protection of the statute, and no bar to the proceedings taken in bankruptcy by the respondents, to whom indeed promissory notes of the nature contemplated by the deed have never been either given or tendered. It is urged however on the other side that this is not, nor was meant to be, a trust-deed, but that under the 192d and following clauses of the Act of 1861 a composition deed will, upon the fulfilment of the statutory conditions, be binding upon non-assenting creditors equally with those who have assented, and * that this deed is one * 249 within the scope of these sections. But we submit that the policy of the Act of 1861 has been to increase, rather to relax, with respect to deeds intended to operate under the 192d and following sections, the stringency of the requisites to deeds of arrangement under the Act, of 1849, as established by the decisions of the Exchequer Chamber in *Tetley v. Taylor*, (a) of this Court in *Ex parte Wilkes*, (b) and of the Court of Exchequer in *Irving v. Gray*, (c) and recognized by the House of Lords in *Larpent v. Bibby*, (d) and which must be supposed to have been present to the mind of the legislature when engaged in passing the Act of 1861. Whilst under the former Act the most general kind of deed was contemplated, and one safeguard alone was added, viz., the execution by six-sevenths in number and value of the creditors, the new Act, in language substantially the same, contemplates deeds not more general in intrinsic character, *Walter v. Adcock*, (e) and requires compliance with seven conditions instead of one. The change of the conjunctive "and" into the disjunctive "or" is relied upon as evidencing an altered intention of the legislature.

(a) 1 El. & Bl. 532.

(d) 5 H. L. Cas. 481.

(b) 5 De G., M. & G. 418.

(e) 7 H. & N. 541.

(c) 3 H. & N. 34.

Had however such an alteration been intended, express language would have been used, and a change of principle so fundamental would not have been left to be inferred from a change of language so small.

[THE LORD JUSTICE KNIGHT BRUCE. — According to the words of the present enactment, would not a gratuitous release be within it ?]

It would, if the construction contended for on the other side is the right one, and this would be so unreasonable a consequence as to forbid such an interpretation. The heading prefixed to these sections, upon which stress has been laid, simply introduces that portion * of the Act in which the legislature has gathered together its enactments relative to all kinds of deeds of arrangement, so that, although it may be true that the 192d section refers to different kinds of deeds, among which the second condition specified in the section contemplates the possibility of there being some in which there is no intervention of trustees, this merely shows what the cases of *Ex parte Wilkes*, (a) *Irving v. Gray*, (b) and *Ex parte Calvert* (c) showed with respect to deeds of arrangement under the former Act, viz., that inspectorship deeds, in which as a rule there is no intervention of trustees properly so called, are within the scope of the present act. The fifth condition applies to cases where there are trustees, and cannot be read as if the words "if any" followed the words "by the trustee or trustees." The 194th section, larger in its terms, and not meant as a mere idle repetition of the 192d, is merely a fiscal provision, and includes all the deeds mentioned in the heading, including therefore deeds operating under the 192d section amongst others. It shows, however, that the legislature did not contemplate an entire absence of the debtor's property from the operation of these deeds, and the 197th section clearly contemplates an administration of property. But even if the policy of the new enactment be thought to differ from that of the Act of 1849, still a deed framed as this is cannot operate under the act so as to bind other creditors than those who assent to it; for it is not a mere composition deed, but a deed which, by assigning all

(a) 5 De G., M. & G. 418.

(c) 3 De G. & J. 95.

(b) 3 H. & N. 34.

the debtor's property to the sureties for their own benefit, places that property out of the creditors' reach.

Mr. Bacon, in reply. — The intentions of the legislature must be gathered * from the language which it has used. * 251 The heading prefixed to the 192d and following sections of the Act applies to three several classes of deeds, each of which is dealt with in the subsequent sections of the Act upon the principle of *reddendo singula singulis*. The first of the conditions specified in the 192d section, when it speaks of "such deed," clearly comprehends composition deeds, which are among those mentioned in the heading. The second deals with one only of the classes of deeds mentioned in the heading. The seventh cannot apply to a composition deed where there are no trustees. By the 193d and 194th sections, the legislature requires the registration not only of each of the three classes of deeds mentioned in the heading and the opening of the 192d section, but also of others then for the first time mentioned. And if any thing more were wanting to show that the scope of the law is enlarged rather than restricted, the creditors are no longer required actually to execute the deed, but may content themselves with written assent or approval.

[THE LORD JUSTICE TURNER. — Do not the words in the 193d section, "the names and descriptions of the parties to every such deed or instrument, not including the creditors," seem to imply that the legislature was dealing with deeds to which creditors are actually parties?]

No doubt the words apply to deeds to which some creditors are actually parties. But with regard to composition deeds, the Act construed according to its terms comprehends them: nor is it unreasonable so to construe it, for creditors best know their own interests, and composition deeds are at once reasonable and in common use. As to the assent of Messrs. Eaton, Cayley, & Co., the appellant knew when making his affidavit that they were then satisfied upon the points reserved by them, and that therefore their assent had become at that time in fact unconditional.

* But, if necessary, there may be further inquiry into the * 252 matter.

Then, it is said, that Messrs. Eaton, Cayley, & Co. were secured creditors, and that the amount due to them for the purposes of computation was the balance only of the 1400*l.* after deduction therefrom of the value of securities held by them, for which argument reliance is placed upon the General Orders of the 22d of May, 1862. But those orders cannot consistently with the 45th section of the Act, under the authority of which they are made, enlarge the words of the Act itself. The 97th section of the Act is also relied upon, but its very language shows its inapplicability. Moreover, of the securities in question, the policy of assurance is valueless, and the others are not part of the appellant's estate. There should, therefore, be no deduction. If, however, the value of these securities be assumed to exceed the amount secured, and to be wholly to be deducted to the amount of 1400*l.*, the aggregate amount of all the debts after such deduction will be 3549*l.* 5*s.* 2*d.*, and three-fourths of that sum, 2661*l.* 18*s.* 10½*d.* The aggregate in value of the assents being after a like deduction equal to 2904*l.* 12*s.* 2*d.*, the statutory majority is obtained with a margin of 242*l.* 13*s.* 3½*d.* The same result is obtained if the value of the securities from third persons is deducted, which however would be contrary to the rule in bankruptcy. For according to that mode of reckoning, Messrs. Eaton, Cayley & Co. are, in fact, secured only to the extent of 700*l.*, the policy of assurance for 1000*l.* being valueless. From the total amount of debts therefore, 4949*l.* 5*s.* 2*d.*, there would have to be deducted 700*l.* the secured portion of Messrs. Eaton, Cayley, & Co.'s debt of 1400*l.*, and there * 253 would remain 4249*l.* 5*s.* 2*d.*, three-fourths * of which sum is 3186*l.* 18*s.* 10½*d.* On the other hand, if from the total amount in value of assenting creditors, 4304*l.* 12*s.* 2*d.*, there be deducted the same 700*l.*, there remains 3604*l.* 12*s.* 2*d.*, showing even on this calculation assents greater in value than are required for the purposes of the statutory majority.

Judgment reserved.

December 6.

THE LORD JUSTICE KNIGHT BRUCE.—Whether the deed on which the appellant relies in this case as invalidating the adjudication is an instrument so worded, an instrument such in its provisions as to come, or be capable of being brought, within the 192d section

of the Bankruptcy Act of 1861, I decline expressing an opinion at this time but I assume, for the present purpose, that it is so. I assume too in his favour, but without asserting, that the seventh condition at the end of that section is not applicable in the present instance.

I think, however, that he fails as to the first and fifth conditions with respect to the assent or approval required. It seems to me neither established nor probable, that before the end of the forty-eight hours mentioned in section 193, or before the entry there mentioned, or registration, the assent in writing, or approval in writing, necessary, was obtained.

Especially it is not I think shown, or likely, that as to the debt of Messrs. Eaton, Cayley, & Co. (1400*l.* or * more) * 254 the conditions mentioned in the letter of Messrs. Thompson & Phillips, dated the 27th September, had before or at either of those periods been complied with; and I am of opinion, that neither the deed nor the registration affects the adjudication; which cannot, as I conceive, be properly (now at least) (a) annulled. But if the appellants shall desire to adduce further evidence before us, or if he or the persons to whom the assignment was made shall desire to bring an action to try the validity of the adjudication, I have no objection to either course being taken, though I am not for now staying proceedings under the adjudication.

THE LORD JUSTICE TURNER. — This is an application on the part of Samuel Bagley Rawlings, the bankrupt, to discharge an order of Mr. Commissioner GOULBURN, confirming an adjudication of bankruptcy against him and to annul the adjudication.

The application proceeds upon this ground, that before the adjudication of bankruptcy the bankrupt had executed a deed which it is contended was a deed of composition with his creditors within the meaning of the 192d section of the Bankruptcy Act, 1861, and the deed had been, as it was contended, assented to in writing by the requisite proportion of the creditors both in number and value, and had been registered according to the provisions of the statute upon the affidavit of the bankrupt verifying the fact of such assent, whereby, as it was insisted, the deed had become valid and

(a) See *Ex parte* Burnett, 4 De G. & Sm. 54; *Ex parte* Bower, 1 De G., M. & G. 468, 475.

binding upon all the creditors of the bankrupt, including the creditor at whose instance the adjudication was made.

* 255 * No question appears to have been raised before the learned commissioner, as to the deed having been assented to in writing by the requisite proportion of the creditors in number and value; but in the course of the argument before us, the written assents of the creditors were called for on the part of the respondents, and were produced on the part of the bankrupt; and upon the production of them it appeared to my learned brother, and I fully agree with him upon the point, that a creditor for 1400*l.* or upwards, who had been reckoned by the bankrupt as an assenting creditor, had at the time of the registration given a conditional assent only and not an absolute assent, and that this debt of 1400*l.* or upwards being deducted, there was not the requisite proportion in value of creditors assenting to the deed. It was, indeed, attempted to be made out on the part of the bankrupt, that after deducting this debt of 1400*l.* there would still be the requisite proportion in value of assenting creditors; but this result was arrived at by deducting the amount of this debt from the aggregate amount of all the debts, and not from the amount of the debts of the assenting creditors only, a course of proceeding which is plainly wrong. Assuming, therefore, these facts to be properly before us, it would be impossible, as it seems to me, to maintain this deed; but I am by no means satisfied that we ought to take notice of these matters whilst the registration stands unimpeached, and at all events these matters arise upon new evidence, and the bankrupt therefore was well entitled to ask for liberty to adduce further evidence with respect to them. This application was made on his part and if it be persisted in, I am willing to accede to it; but at the same time I think it right to state my opinion upon the substantial points of the case, which were adjudicated upon by the learned commissioner, and were fully argued before us.

* 256 * This appeal raises two questions, one a general question extending to all cases, the other a particular question applying to this particular case. The general question is this; whether the 192d section of the Bankruptcy Act, 1861, applies to a mere deed of composition where the deed does not contain and is not accompanied by any *cessio bonorum*. Before the passing of this Act, the law was well settled that in order to validate an arrangement between a debtor and his creditors under the Consol-

idation Act, there must be a complete *cessio bonorum*. And it was argued in this case on the one hand on the part of the bankrupt, that it was intended by this Act to alter this state of the law, and on the other hand on the part of the respondents that there was no such intention, the provisions of the Consolidation Act and of this Act upon the subject being, as it was insisted, substantially the same. The principle on which this Act is framed seems to me to determine this question in favour of the appellant's view. This Act is not framed upon the principle of repealing and re-enacting. Where no alteration is intended to be made, the Consolidation Act is left in force. Where alteration is intended, the enactment of the Consolidation Act is repealed. Seeing, then, that the enactments of the Consolidation Act upon this subject are repealed, we must, I think, conclude that an alteration in this respect was intended.

The question then must be, To what extent was the 192d section intended to affect the alteration? This must of course depend on the terms of the section. It is in these terms: [His Lordship read it.] The terms of this section, therefore, are perfectly general; they extend to every deed or instrument between a debtor and his creditors relating to the several matters which are mentioned in the section, or any of such matters; and I do not see how it can be said, that a deed of composition * provid- * 257 ing for the release of the debtor from his debts upon payment, either by him or any person on his behalf, of a composition upon those debts, although it may not contain any assignment of his estate or any part of it, does not fall within those terms. It was said however, that the conditions specified in the section and other parts of the Act which were referred to in the argument, proved that no deed or instrument which did not comprise or affect the property of the debtor was contemplated as being or intended to be within the operation of the section. But, it is to be observed, that the section is not limited in its operation to composition deeds, but extends, generally, to trust-deeds for creditors, which ordinarily do, and to composition and inspectorships which may or may not, affect the property of the debtor. There are deeds, therefore, pointed at by the section, to which all the conditions specified in it and the other enactments referred to would apply, and I do not think it would be a sound construction of the section to hold that it was not meant to apply to any deed unless

all the annexed conditions would also apply to it. The argument would, as it seems to me, go too far. It would exclude from the operation of the section, not only releases founded on covenants to pay at a future day, but all deeds and instruments of arrangement with debtors having no available property; and this, too, notwithstanding the Act, in terms, extends to insolvents of every class and description. The better conclusion, I think, is, that these conditions are to be read with reference to the subject-matter to which they are applied, *reddendo singula singulis*.

On the general question, therefore, my opinion is, that this section extends to deeds of composition, although there may be no *cessio bonorum*; but I desire to be understood as expressing this opinion, with all possible deference to the contrary opinion expressed by one or more of the learned Barons of the Court of Exchequer, for whose opinion I entertain the highest respect.

Having said thus much upon the general question, I proceed to consider the particular question arising in this case. Although the section, in my opinion, extends to deeds of composition where there is no *cessio bonorum*, it does not, in my judgment, extend to deeds of composition of every description. I agree in the opinion expressed by one of the learned Barons of the Court of Exchequer, that in order to bring a case within the section the composition must be with all the creditors. I read the section thus: Every deed or instrument relating to the debts and liabilities of the debtor and relating also to his release therefrom or to the distribution, &c., of his estate or to any of such matters, shall be valid, &c. In effect, the deed must relate to the debts and liabilities, and to some one or more of the other specified matters; and I, think, that the words "debts" and "liabilities," as used in the section thus read, must be taken to relate to all the debts and liabilities; for not only is this, as I conceive, the ordinary meaning of the words, but it is scarcely possible to suppose that the legislature could intend that all the creditors should be bound by an arrangement which was partial and confined in its operation to some of them only. In all these cases, therefore, I think, the question to be considered must be, Does the deed or instrument extend to all the creditors? Now, the deed before us in this case is as follows: [His Lordship read it.] This deed is not, as it seems to me, a trust-deed for the benefit of creditors. There is

no trust fixed upon the property assigned by it. It is, as it seems to me, a mere deed of arrangement between the bankrupt and the parties to whom the property is assigned, by which those parties come under the obligation * of paying the creditors * 259 of the bankrupt to whom promissory notes were given, but no others of his creditors. No creditor of the bankrupt could, as I understand this deed, insist in his own right, or otherwise than through the bankrupt, on his debt being paid, or any promissory note being given to him for the payment of it.

I agree, therefore, with the learned commissioner, that this is not a deed of composition within the meaning of the 192d section; and, subject to the option on the part of the bankrupt to adduce further evidence as to the assent, if it shall be desired on his part to do so, I think this application must be refused and with costs, to the extent of the deposit.

December 10.

Mr. Bacon stated that there was no desire to exercise the option reserved by the Court, and the appeal was consequently dismissed.

* *Ex parte* WILLIAM GODDEN and JOHN GODDEN. * 260

In the Matter of THOMAS SHETTLÉ.

1862. November 24. December 6. Before the LORDS JUSTICES.

The word "creditors" in the first condition specified in the 192d section of the Bankruptcy Act, 1861, means and extends to creditors holding security, good or bad, sufficient or insufficient, as well as creditors wholly without security; and in reckoning the proportion of assenting creditors under that section, the debts due to secured as well as unsecured creditors must be taken into account.

Per L. J. KNIGHT BRUCE. — It is not necessary to apply to set aside the registration and certificate of registration of a deed intended to operate under the 192d section of the Bankruptcy Act, 1861, before questioning the fulfilment of the conditions imposed by that section.

Per L. J. TURNER. — In order to be binding on all the creditors under the provisions of the 192d section of the Bankruptcy Act, 1861, composition deeds must extend to all the creditors.

Semble, per L. J. KNIGHT BRUCE, that under the Bankruptcy Act, 1861, the

Court of Bankruptcy has jurisdiction to discharge out of custody a debtor who, after having executed a deed of composition in conformity with the 192d section, is arrested by a creditor without the leave of the Court of Bankruptcy.

THIS was an appeal by Messrs. William and John Godden, from an order of Mr. Commissioner HOLROYD, discharging Thomas Shettle out of the custody of the sheriff of Southampton, on the ground of his having executed a deed of composition with his creditors, within the meaning of the 192d section of the Bankruptcy Act, 1861.

The deed in question was in the following terms: —

"This indenture made the 12th day of August, 1862, between Thomas Shettle of &c., of the one part, and the several other persons whose names and seals are hereunto subscribed and set, being severally creditors in their own right, or in copartnership, or being agents or attorneys of creditors of the said Thomas Shettle (and hereinafter called the creditors) of the other part. Whereas, the said Thomas Shettle being indebted unto the said several persons whose names and seals are hereunto sub-

* 261 scribed and set, or their respective principals, in the * several sums of money set opposite their respective names in the schedule hereunder written, and being unable to pay the same in full, he has lately proposed to the said creditors, and it has since been mutually agreed between the parties hereto, that the said Thomas Shettle should pay to the said creditors, and that they should accept from him a cash composition of 4s. in the pound on the full amount, and in full discharge of their respective debts, and that upon payment thereof, the said creditors should execute the release and indemnity hereinafter contained: Now this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises and of the payment to each of the said creditors aforesaid of a composition of 4s. in the pound, upon and in discharge of their said respective debts and claims, the receipts whereof they do hereby respectively acknowledge, they, the said several creditors, do and every of them doth, by these presents fully and absolutely acquit, release, and discharge the said Thomas Shettle, his heirs, executors, and administrators, of and from all and singular the debts, sums of money, bills, bonds, notes, accounts, reckonings, costs, charges, damages, ex-

penses, judgments, executions, actions, suits, claims, and demands whatsoever, either at law or in equity, which they the said several creditors respectively, or their or any of their partner or partners respectively, now have or shall or may or otherwise could or might hereafter have, claim, challenge or demand of, from, or against the said Thomas Shettle, his heirs, executors, or administrators, or his or their lands or tenements, goods or chattels, estate or effects, or any of them, for or by reason or on account of the debts, claims, and demands of them or any of them respectively, due or owing from the said Thomas Shettle and set forth in the said schedule to these presents, and all interest and arrears of interest for or in respect of the same * several * 262 debts and premises, or any of them, or for or by reason of any other matter, cause, or thing whatsoever relating thereto; provided always, that the release hereinbefore contained shall be without prejudice to and not extend, or be construed to extend, to prevent any of the said creditors from claiming or realizing any security now held by them or any of them, or from suing any person or persons (other than the said Thomas Shettle) liable to payment thereof for recovery thereof. In witness," &c.

In the account of debts delivered together with the deed to the chief registrar, and verified by the affidavit of the debtor; in obedience to the General Orders of the 22d of May, 1862, (a) no mention was made of the assent or dissent of fifteen secured creditors, the aggregate amount of the sums due to whom was 8085*l.*; and the total amount of the sums due to the debtor's unsecured creditors (twenty-four in number) was stated as 1816*l.* 17*s.* 1*d.*, of which three-fourths was 1362*l.* 12*s.* 9½*d.* All the unsecured creditors, to an aggregate amount of 1407*l.* 2*s.* 10*d.*, were represented as assenting to the deed, with the exception of the appellants. Among the unsecured creditors was placed the name of William Aldridge as assenting for 300*l.*

On the 21st of August, 1862, the deed was registered under the 192d section of the Bankruptcy Act, 1861. On the 25th, the certificate of registration under the 198th section (b) was granted to the debtor, and notice that such certificate had been granted was given on the 26th to the appellants, to whom, at the same time, there

(a) Stated above, p. 235, note.

(b) The sections in question will be found stated above, pp. 232, 234, notes.

was tendered on the part of the debtor a composition,
 * 263 * calculated at the rate of 4s. 6d. in the pound, upon the sums due to them. On the 24th of October, 1862, the debtor was arrested upon a judgment obtained against him at their suit, without leave of the court, pursuant to the 198th section of the Act.

The debtor applied to the commissioner to be discharged, and from the order made upon the application the present appeal was brought.

In opposition to the application an affidavit was filed, made by one William H. Mackey, which stated in effect, that the deponent had been attorney for a creditor named Aldridge in an action in which a verdict had been obtained for 250*l.* and costs; that, when the verdict was given, Aldridge had the security of a deposit of deeds of property belonging to the debtor; that subsequently to the verdict, Aldridge had, at the debtor's request, executed the composition deed for 300*l.*, being an aggregate of 250*l.* debt and 50*l.* costs, on an agreement that he, Aldridge, should receive the composition upon the whole 300*l.*, notwithstanding the deposit, which would realize the whole or greater part of his claim; that the securities were partly realized by him, and the debt thus reduced before he signed the deed; that the realization had produced 120*l.* or thereabouts, and that the remaining part in Aldridge's hands would realize 100*l.* and upwards.

In answer to this affidavit the debtor made an affidavit denying that at the time of the action brought or at any other time Aldridge had security on property of the debtor, and stating that the security referred to was on property of another person named Watts; and that the deponent believed that Aldridge, before signing the
 * 264 deed, had stipulated that his consent thereto should * not prejudice his right on the securities in his hands deposited by Watts.

Mr. Giffard and *Mr. Ernest Reed*, for the appellants. — There was no power vested in the commissioner to make the order under appeal. But even if the question of jurisdiction were conceded, the case of the respondent would not be advanced, for the evidence shows that the conditions imposed by the 192d section in relation to deeds intended to operate under it have not been complied with.

For what is the meaning to be placed upon the expression "the creditors" found in the first of those conditions? There is nothing in the Act analogous to the provisions of the 224th section of the Bankrupt Law Consolidation Act, 1849, (a) to render it necessary or proper to construe it as meaning, so far as it applies to secured creditors, such creditors after deducting the value of the property comprised in their securities; excluding therefore from consideration in the computation of the statutory majority fully secured creditors altogether. The omission in the present Act of all words leading to that interpretation shows that the expression is used in its largest sense, and that by the majority in number representing three-fourths in value of the creditors of the debtor mentioned in the 192d section, the legislature contemplated a majority of all such creditors secured and unsecured. The principle of bankruptcy was to apply, and every creditor was intended to have the option of coming in and being heard with respect to the deed. Even the general order of the 22d May, 1862, which will probably be relied upon on the other side, by its schedule, (b) requires from the debtor a statement of the "number of creditors," an expression which clearly includes * secured creditors. * 265

[THE LORD JUSTICE TURNER. — The consequence of your argument will be, that the secured creditors might determine that the debtor should be released upon payment of nothing.]

That may be so, but the language of the statute is clear here, equally as it is clear in the 185th and 187th sections, (c) where the expression "the creditors" must include secured creditors and unsecured creditors alike. But even laying out of consideration the secured creditors of the respondent, the requisite majority of assenting creditors is not made up, for Aldridge, as it appears by evidence, which disproves the correctness of the debtor's account, had at the time of his assent, which was reckoned in respect of a debt of 300*l.*, received from the realization of some of the securities which he held upon Watts's property, 120*l.* or thereabouts, and it is calculated that he will receive from the realization of the rest 100*l.* and upwards; and if 220*l.* be deducted from the aggregate amount of debts of assenting unsecured creditors, there will remain

(a) Stated above, p. 230, note.

(c) Stated above, pp. 240, 241, notes.

(b) Stated above, p. 236, note.

1187*l.* 2*s.* 10*d.*, and if the same sum be deducted from the aggregate amount of unsecured debts, there will remain 1596*l.* 17*s.* 1*d.*, three-fourths of which sum is 1197*l.* 12*s.* 9½*d.*; so that the assets are not in value equal to three-fourths of the debts.

Again, the deed in itself cannot, even upon the assumption of the fulfilment of the statutory conditions, bind non-assenting creditors. To have had that effect it should have been made with all the debtor's creditors, or with some on behalf of others, have been for the benefit of all the creditors, and have related to all the debts due from the debtor. *Walter v. Adcock.* (a) As it is, its operation, advantages and obligations are alike by its very terms

* 266 restricted to those of the creditors who execute * it, in which category there is not to be found any secured creditor, nor could such a creditor in the event of his security proving insufficient obtain any benefit under the deed. It may be too that the deed is invalid by reason of its containing no cession of any part of the respondent's property, on which point we will not repeat, but claim the benefit of, the arguments recently addressed to the Court on behalf of the respondents in *Ex parte Rawlings.* (b)

They also referred to the Bankrupt Law Consolidation Act, §§ 112, 113.

Mr. Baggallay and *Mr. Doria*, for the respondent. — It is said that the order under appeal was beyond the jurisdiction of the commissioner to make. The jurisdiction, however, was exercised in *In re Castleton.* (c)

[THE LORD JUSTICE KNIGHT BRUCE. — Was the point raised?]

At any rate the concluding words of the 198th section of the present Act afford ample authority for what has been done. The Court, which according to the explanation to be found in the interpretation clause of the Act, sect. 229, is the Court of Bankruptcy, and which by the 1st section of the Act is to exercise all the rights

(a) 7 H. & N. 541.

(b) See above, pp. 225, 248, *seq.* The present case, and that of *Ex parte Rawlings*, were argued, the latter partially, and the former wholly, upon the same day, the case of *Ex parte Rawlings* having the precedence.

(c) 31 L. J. N. S. Bank. 71.

of the Superior Courts at Westminster, has inherent jurisdiction to enforce its own orders. Assuming therefore the deed to be of the nature contemplated by the 192d section, it * is idle * 267 to say that the appellants could not have obtained their rights in bankruptcy. They should have applied to the commissioner for leave to bring an action, had they wished so to do. But not having made such an application, and having brought their action without making it, they have been guilty of a contempt of Court.

Then it is sought to question the validity of the assents given to the deed; but whilst the registration remains unimpeached, the certificate of registration is conclusive upon the point. If, however, the Court should be of a contrary opinion, still we have the requisite assents on the part of the unsecured creditors, and more is required neither by the terms nor by the scope of the Act. The Act contemplates the case of composition deeds, as the terms of the heading prefixed to the 192d and following sections and the language of the 136th and 185th sections (a) show, and cannot be construed as requiring the assent of fully secured creditors to a composition dividend. The changes made during the passage through the legislature of the bill which afterwards became law as the Bankruptcy Act, 1861, in the 185th and 192d sections, completely displace the observations of the Lord Chief Baron and Mr. Baron MARTIN in *Walter v. Adcock*, (b) as to the absence of clear enunciation of * change from the policy of the for- * 268 mer Act, at the same time that they demonstrate the fact of the change.

As to the question whether it was necessary for the validity of this deed, as one intended to operate under the 192d and following sections of the Act, that a cession of the debtor's property should

(a) See above, pp. 232, 240, notes. The 136th section is, so far as it is material, as follows: "In case of any claim, dispute, or difference between . . . any persons claiming under a trust-deed, deed of composition or arrangement, relating to any . . . debtor's estate, or to any money or property claimed as part of the estate of any . . . debtor, either party may apply . . . to the Court in London; and it shall be lawful for the Court to determine the same, and to summon and examine upon oath the . . . trustee or any other person whomsoever, as to any matters and things concerning the . . . trust estate, and to direct such inquiries and to give such directions and make such orders relative thereto as shall to the Court seem just and expedient. . . ."

(b) 7 H. & N. 541.

have been part of the arrangement contemplated by it, we also are content to rely upon the arguments adduced for the appellant in *Ex parte Rawlings*, with this additional argument, that in this case property is ceded in the shape of present payment to the creditors upon execution of the deed of the stipulated composition.

They also referred to the Bankruptcy Act, 1861, § 97. (a)

Mr. Giffard, in reply. — Contempt of Court implies the existence of an order of Court in respect of which the contempt is committed ; but no such order exists in the present case, and the appellants consequently cannot have been guilty of such an offence in prosecuting their action against the respondent, who should, if desirous of stopping such action, have applied to the Court at Westminster whence process issued.

As to the nature of a composition deed intended to operate under the 192d section, and as to the 136th and 185th sections of Act cited on the other side, those sections point to property of some description being comprised in such a deed, a condition which a mere composition deed *ex hypothesi* does not fulfil. Moreover, this deed is partial in its operation and contains no provision extending to the cases, for example, of contingent * debts or debts payable *in futuro*, or whereunder creditors whose securities fail will be, in the event of loss, able to participate in the contemplated composition. As to the necessity of reckoning the secured creditors in calculating the majority required by the statute, it is material to observe that where the legislature meant to exclude them, as in the cases of petitions, provided for by the 97th section (a) of the Bankruptcy Act, 1861, it has expressly said so ; and its silence on the point in the present instance is evidence of contrary intention : “*expressio unius exclusio alterius*.”

Judgment reserved.

December 6.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, one of appeal from an order made by a very able and experienced commissioner, several points have been argued. The first is as to jurisdiction,

(a) Stated above, p. 247, note.

with regard to which it was contended that the learned commissioner had not by law authority to make the order or entertain the application upon which it was made. There having not been in the present instance actual bankruptcy, the point is, I think, reasonably open to a difference of opinion. But my impression from the 197th and 198th sections and other parts of the Bankruptcy Act of 1861 is, that the commissioner had the jurisdiction, — that it was not necessary to apply to a Judge of one of the Courts at Westminster, and that the appellants' objection as to this point is not well founded, though I do not feel confident upon it. I assume however the respondent to be so far right.

The second point relates to the meaning of the word * "creditors," as used in the first of the conditions forming * 270 part of the 192d section of the Bankruptcy Act of 1861. Does that word where it occurs in that first condition mean and extend to creditors holding security good or bad, sufficient or insufficient, as well as creditors wholly without security? The respondent contends that it does not, the appellants that it does. If it ought not to be read as the respondent contends, — if the word "creditors" in it ought not to be limited as his counsel argue — but ought to be construed as the appellants insist, then the majority in number representing three-fourths in value required by the first condition of the 192d section has not in writing assented to or approved of the instrument of the 12th of August, 1862, in question. Consequently, if the appellants' reading is right, there was no bar against the appellants from executing their judgment, and the application to the learned commissioner was, in my judgment, groundless, — unless, indeed, the argument for the respondent, founded on the supposed effect of registration and of the certificate mentioned in the 198th section, is well founded. But it appears to me not well founded. I conceive that neither the registration nor the certificate improves or assists the case of the respondent for any present purpose.

What, then, is the meaning of the word "creditors" as used in the first condition of the 192d section? If construed literally — construed according to grammar — construed according to idiom — the word must certainly, I apprehend, be read and understood as the appellants contend. But does the context, does the general intention, does the purview, of the statute to be collected from the whole of its contents, demand or justify a departure from that

reading, from that understanding? I find myself unable to
 * 271 answer that question in the affirmative, and * especially
 unable to say that the respondent's case is advanced or
 assisted by the 97th section or the interpretation clause. It seems
 to me, that the word "creditors" in the first condition of the
 192d section ought to receive a literal interpretation, an interpreta-
 tion in conformity with grammar and idiom, and that the respon-
 dent's case therefore (whether on any other, or not on any other
 ground also) fails.

It has been said that this interpretation is likely to produce
 inconvenience. It may be so; but I believe that, if it is material
 or relevant to consider the greater or less amount (if any) of
 inconvenience likely to follow from either construction, the re-
 spondent's interpretation is likely to produce at least as much
 inconvenience as that of the appellants, though (it may be) of a
 different kind. I do not declare or intimate an opinion as to any
 point raised on the appeal, but those on which I have expressly
 stated an opinion. Differing most respectfully from the learned
 commissioner, I think that the order under appeal should be dis-
 charged.

Let me add, that if, as I am informed, the hope of a legislative
 revision of this Act taking place was expressed lately by one of
 the Superior Courts at Westminster, I join in that hope, nor will
 the revision, I trust, be narrow in its range or long delayed.

THE LORD JUSTICE TURNER.—I am also of opinion that this
 order cannot be supported.

The learned commissioner could not, as it seems to me,
 * 272 have any jurisdiction to make the order, unless * the deed
 executed by the respondent was valid and binding on all the
 creditors, under the provisions of the 192 section of the Bank-
 ruptcy Act, 1861; and in my opinion this deed, like the deed in
Rawling's Case, was not so valid and binding, primarily, I think,
 for the same reason as in that case, that the deed does not extend
 to all the creditors; for the deed is in this form: [His Lordship
 stated it.] I do not see how any creditor, not a party to the deed,
 could insist on coming in under it, and being paid the composition
 provided by it; but beyond this there is, as it seems to me, another
 objection which is fatal to this deed. I think it has not the assent of
 the necessary proportion in value of the creditors; for, according

to the best opinion which I can form upon the point, I think that, in reckoning the proportion of assenting creditors under this section, the debts due to secured as well as unsecured creditors must be taken into account. Otherwise, creditors imperfectly secured would be left at the mercy of the unsecured creditors.

The Order of May, 1862, referred to in the argument, may probably have been intended to meet this difficulty, but I do not think that the construction of the Act can be altered or affected by any General Order.

* *Ex parte* JOHN WENSLEY.

* 273

In the Matter of JOHN WENSLEY, a Bankrupt.

1862. December 19. Before the Lord Chancellor Lord WESTBURY.

An assignment of the principal part of the assignor's property may be an act of bankruptcy, although not executed by the assignor spontaneously, if it appear that the provisions of the deed must necessarily have the effect of delaying and defeating the assignor's creditors. And where such an assignment was made to trustees, one of whom was an accountant employed with a view to and under the assignment, upon trust out of the proceeds of the assigned property in the first place to pay all costs, charges, and expenses due or to become due to the assignor's solicitor, and the professional charges of the accountant-trustee, and other expenses, and subject thereto to divide the proceeds ratably among the creditors who should execute the deed, and the deed recited that the assignor was not prepared to pay his debts in full: *Held*, that the necessary effect of the deed was to defeat and delay the creditors, and that it was an act of bankruptcy.

An assignment of the principal part of the assignor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, although not registered under the Bankruptcy Act, 1861.¹

THIS was an appeal from an order of Mr. Commissioner PERRY, of the Liverpool District Court of Bankruptcy, confirming an adjudication of bankruptcy against the appellant.

The act of bankruptcy on which the adjudication was made was the execution by the appellant of an indenture, dated the 4th of June, 1862, and expressed to be made between the appellant of

¹ See *Ponsford v. Walton*, L. R. 3 C. P. 167, 172; *Ex parte* Squire, L. R. 4 Ch. Ap. 47.

the first part, Thomas Bagot of the second part, and the several persons whose names and seals were thereunto subscribed and affixed, by themselves or their several attorneys lawfully appointed for that purpose, being respectively creditors of the appellant of the third part.

The deed recited that the appellant was seised of or otherwise well and sufficiently entitled to the piece of land, messuages, and hereditaments thereafter firstly described, for an estate of inheritance in fee-simple, subject to certain encumbrances thereafter mentioned; that by an agreement of the 9th of January * 274 then last, * expressed to be made between Thomas Yates of the one part and the appellant of the other part, the appellant agreed to purchase (along with other land) the piece of land secondly thereafter described for an estate of inheritance, and Thomas Yates agreed to make him certain advances to enable him to build on the land contracted for; that the appellant, without having taken up his conveyance to the land thereafter secondly described, had recently erected thereon five dwelling-houses, and had become indebted to Thomas Yates in a considerable sum of money; that the appellant was indebted to the said several persons parties to the deed of the third part in the several sums of money set opposite their respective names in the schedule thereunder written, and was not prepared to answer or pay the same; and that the appellant had agreed to grant and convey the hereditaments thereafter described to Thomas Bagot, his heirs and assigns, upon trust for the benefit of the said persons, parties to the deed of the third part, in manner thereafter expressed.

By the first witnessing part, the appellant conveyed to the use of Thomas Bagot his heirs and assigns two pieces of land, with certain buildings thereon, at Everton, in Lancashire, subject nevertheless, as to the hereditaments firstly described, to a mortgage and other encumbrances thereon, and as to the hereditaments secondly described, to Thomas Yates' lien for the residue of the purchase-money then owing by the appellant to him, and also to certain advances made by him to the appellant for the purpose of enabling the latter to build on the land. It was declared that Thomas Bagot, his heirs or assigns, should hold the premises upon trusts for sale; and should out of the proceeds discharge all costs, charges and expenses then already or thereafter to become * 275 due to the appellant's solicitor therein mentioned, * and

the professional charges of Thomas Bagot in his capacity of accountant therein, and the costs and charges attending the sale or sales, and the money which the trustees might disburse for the interest due to the solicitor, taxes and repairs of the said premises, and the insurance of the buildings thereof, &c. or otherwise in carrying the trusts contained in the deed into execution, and should pay to the solicitor, his executors, administrators, and assigns, all principal and interest moneys then or thereafter due and owing to him; and apply the residue of such proceeds in payment of all the debts or sums of money owing by the appellant to such of the creditors as should execute the deed, ratably and in proportion to the amount of the debts or sums of money owing to them respectively; and if, after payment of the same, any surplus should remain, should pay such surplus to the appellant, his executors or assigns, or as he or they should direct.

There was a further witnessing part, whereby in consideration of the conveyance made by the appellant and of the trusts of the deed, the said several and respective creditors who by themselves or the persons respectively authorized by them had sealed and delivered the deed, covenanted with the appellant, his heirs, executors and administrators, that the present covenant should operate and enure, and might be pleaded as a release; and that creditors taking proceedings against him should thereby incur a forfeiture of their debts.

The deed was executed by the appellant and Thomas Bagot, and by seven of the appellant's creditors, but not registered as required by the Bankruptcy Act, 1861. (a)

* The solicitor, in his examinations before the commis- * 276
sioner, stated that, besides the property comprised in the deed, the appellant, who was a builder, had household furniture and trade utensils, and two or three pieces of land in the same neighbourhood with those comprised in the deed, under a contract for purchase from Thomas Yates, upon one lot of which he had commenced laying foundations. The deponent further stated, that he believed some debts to be due to the appellant, but could not say to what amount; but he believed that Thomas Yates was one of the debtors to the extent of 50%. He did not know of any other property of the appellant. He stated that he had prepared the

(a) See sect. 194, set out above, p. 233, note.

deed of the 4th of June, in consequence of a meeting of the appellant's creditors held on the 31st of May previously for the purpose of gaining time to arrange with the appellant's creditors. He further deposed, that the encumbrances mentioned in the first recital in the deed as existing upon the property first therein described consisted of a mortgage to himself, executed in the preceding March, for 1350*l.*, and a memorandum of further charge of about 40*l.* executed in the following April. On cross-examination he stated that the circumstances which led to the preparation of the deed of the 4th of June, 1862, were these, that the meeting of the appellant's creditors, held on the 31st of May, was adjourned to the 4th of June; that on the 2d of June the deponent attended several of the creditors, of whom he mentioned five, and that they insisted on an assignment, one of them stating, that unless the appellant gave up all control over the property, he would file a petition in bankruptcy against him. The deponent said that this was communicated to the appellant on the 3rd, and that the draft was drawn, in accordance with the creditors' wishes and after

communication with some of them, on the same day; he * 277 said that he was, to the knowledge of the creditors, *to be the solicitor to carry the trusts of the deed into effect, and that the costs, charges and expenses mentioned in the deed or thereafter to become due to him were those of carrying the deed into effect; and that those mentioned as already incurred were the expenses of an attempted sale made upon the instructions of the appellant, and some preliminary charges in reference to the appellant's affairs, altogether amounting to about 32*l.*

The appellant in his examinations stated, that at the date of the deed of the fourth of June, the amount of his unsecured debts was about 440*l.*, and that the property assigned by the deed was sufficient to pay on that day 40*s.* in the pound; that the deed was executed in consequence of pressure put upon him by the creditors. That on the 4th of March, 1862, he had had an offer of 2000*l.* made to him for the property in mortgage to the solicitor, also an offer of 1600*l.* for one house out of the four comprised in that mortgage; that the value of the remaining three houses had been valued in November, 1861, by an architect, and should be worth at least 650*l.*, they bringing in 61*l.* a year; that the appellant estimated the value of the property mortgaged to the solicitor at 2600*l.* By the certificate of the architect mentioned by the appel-

lant as having valued the property in November, 1861, it appeared that this architect had estimated its value at 2280*l*.

Thomas Bagot in his examinations proved that, upon the occasion of an attempted sale on the 14th of October, 1862, he was authorized by three of the appellant's creditors to place a reserved bidding on the first lot at 1800*l*.

On cause being shown against the adjudication the * com- * 278 missioner held, that the execution by the appellant of the deed of the 4th of June, 1862, constituted an act of bankruptcy, and confirmed the adjudication.

Mr. De Gex, for the appellant, took a preliminary objection that, the deed not having been registered as directed by the statute should not have been received in evidence, the terms of the Act being positive and express; and he contended, that by admitting the unregistered and unstamped document in evidence for the purpose of founding an adjudication upon it, the commissioner had admitted it for the purpose of giving effect to it, and not for a merely collateral object, so as to bring its admission within the exceptional cases decided under similar enactments.

The Lord Chancellor said, that although the deed could not have been received in support of any title or release under it, as for example against any creditor suing the debtor, or taking proceedings against him in trover or ejectment, yet, as the act of and as against the debtor, and for the purpose of undoing the effect of the deed, it was receivable in evidence. (a)

Mr. De Gex. — Upon the merits of the case this deed does not, according to the evidence, comprise the whole or substantially the whole of the debtor's property. It is therefore not on the face of it an act of bankruptcy, and in order to prove that it is one, the respondents must prove that it was a dealing in the nature of a fraudulent preference. (b) But in order to make out

(a) See, on the Stamp Acts, *Coppock v. Bower*, 4 M. & W. 361, and cases there referred to. See also *Rex v. Hall*, 3 Stark. 67; *Rex v. Reculist*, 2 Leach, 706; *Evans v. Prothero*, 1 De G., M. & G. 572; *Parmiter v. Parmiter*, 1 J. & H. 135.

(b) See *Balme v. Hutton*, 2 Y. & J. 108, 109; *Hale v. Allnutt*, 18 C. B. 526.

* 279 * a case of fraudulent preference two things must be shown ; first, that the deed was executed spontaneously, and secondly, that it was executed in contemplation of bankruptcy. In *Van Casteel v. Booker*, (a) Mr. Baron PARKE said, "To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors by proving it to be voluntary and in contemplation of bankruptcy, and if it is made in consequence of the act of the creditor, it is not voluntary." In that case, Mr. Baron ROLFE who had tried the cause said, "If the law be that any thing which emanates from the creditor is sufficient, then my ruling was incorrect, for it was calculated to convey the impression that there would be a fraudulent preference, unless payment was demanded with importunity and pressure, and not requested as a matter of favour," and the Court held that this was a misdirection, and made the rule absolute for a new trial. *Gibbins v. Phillips*, (b) was also a case on a rule for a new trial on the ground of misdirection, the Judge having said to the jury "The most important thing to be considered is whether this was a voluntary deed and done in contemplation of bankruptcy, for then it would be a fraudulent deed." It was in that case contended in the argument, that the learned Judge had erroneously put to the jury two things as necessary, that the deed was voluntary and in contemplation of bankruptcy ; whereas it should have been in the alternative, viz., whether it was voluntary with intent to defeat or delay creditors, or in contemplation of bankruptcy. But Mr. Justice BAYLEY in giving the judgment of the Court said, "There does not appear to have been any misdirection on the part

* 280 of the learned Judge." . . . It * was necessary that there should be two ingredients in the transaction of the bill of sale in order to make it an act of bankruptcy, viz., fraud and the delay of creditors." *Johnson v. Fesemeyer*, (c) is to the same effect, and in many respects resembles the present case. Not only have the respondents failed to prove either of these requisites, but the evidence shows clearly that the deed was executed at the instance of the creditors, and that the appellant had good reason for believing that his estate would pay 20s. in the pound and leave a surplus.

(a) 2 Exch. 706 ; see what is said by C. J. ERLE on these cases in *Edwards v. Glyn*, 2 El. & El. 49.

(b) 7 B. & C. 729.

(c) 25 Beav. 88 ; 3 De G. & J. 13.

[THE LORD CHANCELLOR. — Must not such a deed have necessarily delayed and defeated the assignor's creditors in their proceedings?]

Not in the circumstances of this case. But as the deed does not comprise all the property, it would not be enough that it to some extent defeated some of the creditors, for this may be said in every case in which there has been a conveyance or assignment of part of the debtor's property made to some or one only of the creditors upon a request, and not spontaneously, and in which the debtor cannot pay his debts in full. But here the creditors have not been in fact defeated or delayed, the arrangement made by the deed being one under which every creditor will certainly receive a much larger and more speedy dividend than he will under the bankruptcy, should it proceed, and will in all probability be paid in full; whereas the expenses of a bankruptcy, and the disadvantageous mode of realizing the property under it, render such a result in the latter event very unlikely.

Mr. Bacon, for the respondents, was not called upon.

* THE LORD CHANCELLOR. — The case before me is that of a * 281 man, who being in insolvent circumstances, admitting indeed under his hand and seal that he is not prepared to pay his debts, makes a conveyance of what upon the evidence appears to be the principal part of his property, the primary object of that conveyance being to give a general sweeping charge in favour of his solicitor, a charge framed so as to extend not merely to debts due at the time of the execution of the conveyance, but to debts thereafter to become due; and in the next place to give a similar charge in favour of the trustee, an accountant. Then come directions for the sale of the residue of the property comprised in the deed, and for the application of the proceeds of the sale after satisfaction of the general charges to which I have adverted in favour of such creditors as come in and execute the deed.

Now there may be an act of bankruptcy committed by voluntary payment of money in preference of a particular creditor on the part of a man who knows himself to be so insolvent, that he must expect bankruptcy to be the necessary consequence of the payment. There may be an act of bankruptcy committed by a

fraudulent gift of part of a man's property to a particular creditor under like circumstances. But there may also be an act of bankruptcy committed by the execution of a conveyance so framed, and accompanied by such circumstances, as that the general body of creditors will be thereby defeated or delayed in their proceedings for the purpose of having the debtor's property administered according to the law in bankruptcy. The question in the present case is, whether the commissioner was not right in holding the present deed to come under that category. The appellant's

* 282 counsel argues that in the circumstances of * the case this was not a probable consequence of the deed, inasmuch as it appears upon the evidence that the appellant's property was so large that he might well place it in its present situation, and yet reasonably entertain the belief that the consequence of his so doing would be to promote the interests of his creditors rather than to delay them. I cannot come to that conclusion. The deed seems to me a very improper one.

The evidence as to the value of the appellant's property fails to satisfy me that the property was of such value as to justify its being placed in that position. I think that the deed, made as it was under circumstances of avowed insolvency, was made merely for the purpose of keeping the management, conversion, and distribution of the property entirely in the hands of the appellant's solicitor, and is not such a deed as can be supported; and if it cannot be supported, it is an act of bankruptcy within the meaning of the statute.¹ I think that the learned commissioner's conclusion was correct, and I shall not disturb his order.

¹ See *Perry Trusts*, § 587.

* *Ex parte* THOMAS PAGE and GEORGE PAGE. * 283

In the Matter of WILLIAM COOPER NEAL.

1863. December 5. 1863. January 14. Before the Lord Chancellor Lord WESTBURY.

The 32d of the General Orders in Bankruptcy of 6th November, 1861, providing that no new evidence shall be received on any appeal, unless the Court of appeal shall, on the hearing thereof, so direct, applies to evidence upon the matters in issue, and not to evidence as to what took place in the Court below.

In the former case some ground must be shown for the admission of the new evidence.

It is not necessary that a notice of motion by way of appeal, on the ground, among others, of the rejection of evidence should state that ground.

The certificate of registration of a deed of arrangement with creditors under the 192d section of "The Bankruptcy Act, 1861," is only *prima facie* evidence of the fulfilment of the requisites of that section to which the certificate extends, and may be controverted without a separate proceeding to set it aside.

THIS was an appeal from an order of Mr. Commissioner SANDERS of the Court of Bankruptcy for the Birmingham district, refusing to adjudicate the respondent William Cooper Neal a bankrupt, under circumstances and upon grounds stated in the commissioner's judgment to the following effect:—

"Thomas and George Page, carrying on business in partnership as iron founders, have on the 29th of October, 1862, presented a petition for adjudication of bankruptcy against W. C. Neal, now out of business, but lately carrying on business in partnership with T. Martin as bedstead manufacturers, and the petition has been adjourned till this day. The act of bankruptcy on which it was intended to rely is a deed dated the 22d of August, 1862, by which Neal and his late partner Martin conveyed and assigned all their estate, real and personal, to three trustees, N. Fellows, R. Hill and W. Batson, on trusts for division among their joint and several creditors. The deed being in the possession of the trustees, a summons was sent by the petitioners to the solicitors of the trustees to produce the deed, which was accordingly done: but upon its production, it appeared by an indorsement upon it to have

been registered under the Bankruptcy Act, 1861, on the 18th * 284 of September, 1862. The * solicitor producing the deed proved to me in the form required by the General Orders that the conditions required by the Act had been fulfilled, and he produced to me the certificate of the due registration of the deed signed by the chief registrar in the form pointed out by the General Order. It was proved to me also that the solicitor on producing the deed to the registrar had delivered to him the memorandum required by Order 19 of General Orders, and that the affidavit required by the same order and the certificate of the trustee thereby also required had been duly made in the form there propounded. The memorandum of registration already mentioned to have been indorsed on the deed was also in the proper form. I considered that, so far as the matters referred to in the certificate of the chief registrar are concerned, that certificate was intended by the Act to be evidence at least *prima facie* of the truth of them. But as according to the form of the certificate and the other documents referred to, there appeared to be no distinct proof or recognition of the performance of the provisions required in articles 2, 3, and 7 of § 192 of the Act 1861, I required proof to be made of them: and evidence having accordingly been laid before me that the trustees had executed the deed, that the execution of the deed by the debtor was attested by a solicitor, and that immediately upon the execution thereof by the debtor all the property comprised therein had been given to the trustees, who, as it was stated to me and not denied, have since sold and realized a considerable portion thereof and are ready to make a dividend thereout, I declined to make the adjudication of bankruptcy sought by the petition."

From this decision Messrs. Thomas and George Page appealed.

Mr. De Gez, in support of the appeal, tendered in * 285 * evidence an affidavit, which had not been before the commissioner, and which stated that the petitioning creditors had tendered before the commissioner evidence to show that the conditions specified in the 192d section of the Act of 1861 (a) had not been complied with, but that the commissioner declined

(a) Stated above, p. 232, note.

to receive such evidence, holding that while the certificate remained undischarged it must be accepted as evidence of the fulfilment of those conditions which were certified by it to have been fulfilled.

Mr. Little, for the respondent, objected that consistently with the 32d of the General Orders in Bankruptcy of the 6th of November, 1861, the affidavit being new evidence could not be received on the present appeal unless the Court should now so direct.

THE LORD CHANCELLOR. — The rule applies only to evidence as to matters in issue, and not to evidence as to what took place before the commissioner. With regard to the former the leave of the Court is required, and will not be given as a matter of course merely for the asking. The latter description of evidence could not be requisite if the proceedings contained a note of all that took place. Do the respondents desire an opportunity of answering the affidavit, remembering that it will be at their peril in respect of costs if they do not displace what is stated in the affidavit?

Mr. Little said that he desired to have such an opportunity, but contended that the notice of motion by way of appeal ought to have stated that it was on the ground of the rejection of evidence, and that as it did not so state, the point could not be raised.

* The Lord Chancellor, without calling on the appellants' * 286 counsel, overruled the objection, and said that the respondent in this case might have time to answer the affidavit, but that his Lordship desired it to be understood in future that the order only applied to evidence upon the matters in issue, and that it would not go to the extent of excluding evidence as to what took place before the commissioner. In the present case, it was material to know whether the petitioning creditors did request the commissioner to give them an opportunity of controverting the things stated in the certificate.

Mr. Little. — I submit that the registrar's certificate ought to be received as sufficient evidence of the facts which it certifies,

unless the person who disputes its correctness takes some proceedings for the purpose of discharging it.

THE LORD CHANCELLOR. — Has not a creditor a right to go before the commissioner and to say, "I rely on that deed as an act of bankruptcy?" and if the trustees of the deed thereupon say to the commissioner, "We are in a condition to show that the requisites of the statute have been complied with," and produce the certificate, cannot then the creditor say, "I can show by evidence that the statements in the certificate, which are founded upon the representations of the parties to the deed, are incorrect," and ought he not to have an opportunity of so doing?

Mr. Little. — What I submit to the Court is, that as the certificate is issued and filed and the consequent statutory effect has accrued to the deed, the proceedings of the person who seeks to impeach the validity of the certificate ought to be directed * 287 to some process to set aside the certificate. Such a course would be analogous to the practice with regard to an order in Chancery which had been improperly enrolled. So here the proper proceeding would be one in the nature of a motion to take the certificate off the file.

THE LORD CHANCELLOR. — That would be an unnecessary formality, because the same thing is involved in making an application to treat the deed as an act of bankruptcy, and the statute does not provide any process for discharging the certificate. The certificate is only *prima facie* proof. It cannot preclude the right of any one to challenge the facts which are stated in it. The matter had better stand over, and if the respondent finds the statements of the appellants incorrect, he will answer the affidavit; if otherwise, he may go to the commissioner with a renewed application to enter into the question whether this deed was or was not an act of bankruptcy. If duly registered, it was not; if not duly registered, then it may have been.

1863. January 14.

On this day the matter was mentioned again, affidavits having been filed on both sides, differing in their representations of what had taken place before the commissioner, and after some discussion

the matter was again ordered to stand over, with liberty for the appellants to go before the commissioner and renew their application for an adjudication of bankruptcy against the respondent, with the intimation of his lordship's opinion that the certificate of the registrar did not exclude the testimony proposed to be adduced on the part of the appellants.

The matter was afterwards, as it is understood, arranged between the parties.

* *Ex parte* CHARLES MORGAN, FRANCIS BRYANT * 288
ADAMS, FRANCIS BRYANT ADAMS the younger,
and CHARLES MORGAN the younger.

In the Matter of WILLIAM HENRY WOODHOUSE, a Bankrupt.

1863. January 28, 30. Before the Lord Chancellor Lord WESTBURY.

The registrations of trust-deeds under the 192d and under the 194th sections of the Bankruptcy Act, 1861, although in practice performed by the same officer, are distinct, and have different operations; and where for the want of the papers required by the orders registration under the former section had been refused by the officer, and the applicant had registered the deed under the 194th section: *Held*, that the registration did not prevent the deed, which was an assignment of all the debtor's property, from being an act of bankruptcy.

The 192d section applies only to deeds which contain provisions for the benefit of all the debtor's creditors, and this requisite is not fulfilled by a deed the trusts of which are for the benefit of such of the debtor's creditors as shall execute the deed within a limited time.

Semble, that a deed, to be entitled to the benefit of the provisions of the 192d section, need not comprise the whole of the debtor's property.

Semble, also, that the creditors under a trust-deed are placed in *eodem statu* with creditors under a bankruptcy, and that as the latter cannot prove, without allowing for the value of their securities, the former are subjected to the same obligation.

THIS was an appeal from an order of Mr. Commissioner WEST, of the Court of Bankruptcy for the Leeds district, dismissing the appellant's petition for an adjudication of bankruptcy against the respondent.

By an indenture dated the 25th of October, 1862, and expressed

to be made between the respondent of the first part, Richard Brook, Joseph Woodhead, and George Milthorp, trustees for themselves and the rest of the creditors of the respondents, parties thereto of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being respectively creditors of the respondent, of the third part, after

* 289 reciting that the respondent being justly and truly * indebted unto the said parties thereto of the second and third parts in the several sums set opposite to their respective names in the schedule thereunder written which he was unable to pay in full, had therefore proposed and agreed to assign all his estate and effects unto the said trustees for the benefit of his creditors, as thereafter mentioned, the respondent assigned unto the said trustees, their executors, administrators, and assigns, all and every the stock in trade, goods, wares, merchandises, household furniture, fixtures; plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents, and writings, and all other the personal estate and effects whatsoever and wheresoever of him, the respondent, in possession, reversion, remainder or expectancy, upon trust to collect, receive, or sell and dispose of the said thereby assigned premises and every part thereof, either by public sale or private contract, and in one or more lot or lots, with liberty to give any credit for the same, or to take any security for the purchase-money or any part thereof, as to the said trustees, their executors, or administrators should seem proper; and, upon trust, out of the moneys to be received by virtue of the deed, to pay all costs and expenses of proposing, preparing, engrossing, and executing the deed, and attending or relating to the said thereby assigned premises or the trusts created by the deed; and in the next place to pay, retain, and satisfy, ratably and proportionably, and without any preference or priority to themselves, the said trustees and their partners, and the other persons, parties to the deed, of the third part, who should execute the deed within twenty-eight days from the date thereof, the several debts or sums set opposite to their respective names in the said schedule to the deed, subject to the covenant thereafter contained for verifying the amounts

* 290 thereof, and to pay the residue (if any) of the said * moneys unto the respondent, his executors, administrators, and assigns: provided always, that it should be lawful for the said

trustees to make to the respondent such allowance or return to him such part of his household furniture or effects not exceeding the value of 20*l.*, as they might deem expedient; and also to employ the respondent, or any other person or persons, in winding up the affairs of the respondent, and in collecting and getting in his estate and effects thereby assigned and in carrying on his trade, if thought expedient by them, and to allow to the respondent, or any other person or persons so employed as aforesaid, out of the said trust estate, such sum and sums as to the said trustees should seem proper.

Then followed a power of attorney from the respondent to the trustees, and a clause empowering them to give receipts, which were followed by a proviso, covenant and agreement by and between the said several parties to the deed that it should be lawful for the said trustees, at the expense of the said trust estate, to require the amount of any debt or debts of any or either of the several creditors parties to the deed to be verified by solemn declaration, or in such manner as to the said trustees should seem expedient; and in the event of any such creditor or creditors refusing or failing so to verify his, her or their debt or debts then such creditor or creditors so refusing or failing as aforesaid should lose all benefit, dividends, and advantage to be derived from or otherwise claimed under the deed, any thing therein contained to the contrary notwithstanding; and thereupon the said trustees were thereby authorized and empowered to pay such last-mentioned dividends or dividend unto the respondent. And the trustees were authorized and empowered to pay or make such arrangements with the creditors whose debts were under 10*l.*, as they the said trustees might deem expedient.

* It was then provided, declared and agreed, that any resolution signed by the majority in number and value of the creditors, parties to the deed, should be binding on all the several parties thereto, and should be effectual for the allowance and passing of the accounts of the trustees, and for discharging them from the trusts thereof, and from all claims and demands in respect thereof; and that all questions relating to the trust estate should be decided according to English bankrupt law. * 291

Then followed a trustees' indemnity clause, and provisions for the deposit of the trust-moneys in bankers' hands and for drawing checks; and the deed closed with a general release of the respon-

dent by the "said several creditors, parties" to the deed, "of the second and third parts," subject to the proviso next thereafter contained, being a proviso for avoidance of the release in case the respondent had concealed or kept back any part of his estate and effects to the value of 20*l*. except the linen and wearing apparel of himself and his family.

All the formalities required by the General Order of the 22d of May, 1862, for the registration of a deed under the 192d section (a) of the Act, not having been complied with, the deed was registered — as was stated, both in the memorandum of registry filed in Court and on the face of the memorandum of registration written on the deed in pursuance of the 196th section — under the 194th

section of the Act; and in the short statement of its nature * 292 contained in the former memorandum, it was * described as

"an assignment of personal estate and effects of the said William Henry Woodhouse, in trust for the general benefit of all his creditors."

The appellants filed a petition for adjudication of bankruptcy against the respondent; and upon an application by the respondent for the dismissal of the petition, the learned commissioner — being of opinion that the requirements of the statute had been so far complied with as to bring the case within the 198th section — dismissed the petition.

The present appeal was from the order so made.

Mr. Bacon and *Mr. Clements Swanston*, for the appellants. — The execution by a debtor of a deed of this nature is an act of bankruptcy on his part, unless the deed executed can operate as a valid deed, under the Bankruptcy Act, 1861, § 192. The deed now before the Court cannot, however, so operate, for several reasons. In the first place, its benefits, instead of being extended to all the respondent's creditors, are restricted to such of them only as shall execute it within an arbitrarily prescribed number of days from its date; and are not even extended to such of that limited class of creditors as may not, in addition, consent to verify the amount of the moneys due to them in a manner equally arbitrarily prescribed in the deed; and upon non-compliance with this requirement a

(a) The sections and General Order in question, and the sections of the Acts of 1849 and 1861, referred to in the course of the arguments and in the Lord Chancellor's judgment, will be found set out above, p. 280, *seqq.*

penalty is imposed in the shape of an authority to the trustees to forfeit the dividends, which otherwise would have belonged to the defaulting creditors, in favour of the respondent himself. No statutory majority of creditors, and no debtor, in whose favour alone such clauses can operate, can be held to be able to bind the minority by them. * *Walter v. Adcock*, (a) *Ex parte Rawlings*, (b) and *Ex parte Godden*, (c) show that a deed so framed as to benefit some only of a debtor's creditors, to the exclusion of others, is not within the protection of the Act. Secondly, the deed does not even purport to bind non-assenting creditors; the release being, by its terms, made capable of being pleaded against executing or assenting creditors only. Thirdly, the policy of the legislature, as evidenced in the enactments of 1849, with respect to the essential provisions of deeds of this nature required in them, as decided by the Court of Exchequer Chamber in *Tetley v. Taylor*, (d) a dealing with the whole of the debtor's estate, and that policy, which has not been changed by the enactment contained in the Bankruptcy Act, 1861, is contravened by the provision contained in this deed for making allowances to the debtor and returning to him household furniture and effects to the value of 20*l*. *Cooper v. Thornton*. (e) Lastly, this deed can be no bar, under the 198th section of the Act of 1861, to the appellant's proceedings in bankruptcy; for that section gives such an effect only to deeds within the protection of and registered under the 192d section. This deed was not registered according to the provisions of the General Order of the 22d of May, 1862, as to leaving a copy of the deed with the chief registrar, but under the 194th section only, — a section introduced for fiscal purposes, and not intended to have any effect in barring proceedings in bankruptcy. The words, "given as aforesaid," used with reference to the notice spoken of in the 198th section, which is to have the effect of barring such proceedings and excluding subsequent adjudication, refers to the provisions as to notice under the 193d section; and the notice by advertisement * in the London Gazette, * 294 required in the 193d section, applies only to deeds answering the description given in the 192d section, in which category the present deed is not.

(a) 7 H. & N. 541.

(d) 1 El. & Bl. 521.

(b) *Supra*, p. 225.

(e) 1 El. & Bl. 544.

(c) *Supra*, p. 260.

Mr. De Gez, for the respondent. — With reference to the objection that this deed does not effect a complete cession of the respondent's property, the present Act differs essentially from that of 1849, by the substitution of the word "or" in the 192d section of the former for the word "and" in the 224th section of the latter, thus taking away one of the principal grounds on which *Tetley v. Taylor*, (a) followed by *Irving v. Gray* (b) and other cases, was decided, — a difference which can only be accounted for by supposing it to have been introduced for that purpose. The alteration may have been made with reference to reasons such as were adverted to by Lord CAMPBELL in the original judgment in *Tetley v. Taylor*, where his Lordship in delivering the judgment of the Court of Queen's Bench, and speaking of the language of the 224th section of the Bankrupt Law Consolidation Act, 1849, said: "It is impossible to contend that these words necessarily require that the deed should provide for the distribution of all the trader's effects among his creditors; or that they exclude a deed which allows him to remain in possession of them, on payment of such a composition as is satisfactory to six-sevenths of his creditors, and on the performance of such other stipulations as they consider more for their advantage than forcing him into bankruptcy, or requiring that his trade shall be stopped, that all his property shall be sold, and that they shall accept a dividend from the fund produced by the sale. The section, cautiously and

* 295 anxiously, guards against the * supposition that the deed to be protected must embrace all the matters which it enumerates. We can see no absurdity in supposing that composition deeds are meant to be included in the enactment. We know that they are very common in practice, and are frequently very advantageous both for the creditors and the debtor. The composition offered may be considerably more than would be the dividend on an immediate sale and distribution of his effects; and he may be enabled to pay this composition from the assistance of friends, and from being permitted to avail himself of his position in the commercial world, which would be utterly lost if he were made a bankrupt. A great power is certainly given to the six-sevenths in number and value of the creditors, but they can only place the remaining seventh in the same situation in which they have placed

(a) 1 El. & Bl. 521.

(b) 3 H. & N. 34.

themselves; and it surely would not be imputing any absurdity to the legislature, the words employed by them naturally bearing such a meaning, if we suppose that they consider the risk of the six-sevenths in number and value of the creditors agreeing to accept a composition less than they could obtain by resorting to their legal remedies, was so small as not to deserve consideration; or, at least, to outweigh the risk of fair and beneficial deeds of arrangement being defeated by the refusal of one or two creditors to join in the arrangement, or of dissenting creditors obtaining a preference by refusing to concur until, by a clandestine bargain, their claims are fully satisfied. Our books of reports abound with cases which have arisen out of such fraudulent transactions, and an attempt to put an end to them might be considered not unwise or unbecoming." But, besides the language of the 192d section of the Act of 1861 being framed in the disjunctive, whilst that of the 224th section of the Act of 1849 was framed in the conjunctive, the 7th condition specified in the former section assumes that there need not be * now a distribution of the whole of * 296 the debtor's estate. *Walter v. Adcock.* (a) No derogation from the enactment contained in that 7th condition is implied in the authority given by this deed to the trustees to return a portion of that estate to the respondent.

[THE LORD CHANCELLOR. — This deed relates to the whole of the debtor's estate, for that is the subject of the assignment to the trustees. Consequently the 7th condition requires the delivery of the whole of that estate to the trustees. Is that consistent with the trustees returning a part of it to the debtor?]

There appears to be no inconsistency between the condition and the power which assumes the condition to have been fulfilled. It is not to be assumed that the trustees would exercise the power in any manner contrary to the interest of the creditors or the intention of the Act; while if the proposition be pushed to its extreme limit, the respondent must have delivered up every thing, even to his wearing apparel. The more enlarged provisions of the present Act were no doubt introduced to obviate the absurdity of such decisions as that in *Snodin v. Boyce*, (b) where a trust for the

(a) 7 H. & N. 541, 561.

(b) 4 H. & N. 391.

distribution of all the debtor's property except such portions as would have been retainable by him under a bankruptcy was held invalid under the Act of 1849, — an absurdity thus adverted to by the Lord Chief Baron POLLOCK in his judgment in that case: "Whatever may have been decided as to a power to retain or to give back a part of the property, I cannot assent to this — that when in a statute providing for the distribution of a debtor's property according to certain rules in bankruptcy we find facilities given for arrangement without recourse to the bankrupt law, we should hold that arrangement bad, which in the distribution and division of the property follows the very law to which these

* 297 provisions for arrangement are appended * in the statute in which we find this mode of doing without the bankrupt law.

This arrangement is made in the pure spirit of the bankrupt law to divide all that a bankruptcy would divide; and I cannot think that when the Act of Parliament intended that arrangements should have effect given to them, a deed of this kind, which professes to follow the very result of the bankruptcy code, is in point of law void. I am sorry to differ from the rest of the Court, but I cannot come to this conclusion, that what the statute says in the former part of it should become wrong when carried out by deed of arrangement or inspection."

As to the argument that this is a deed operating not upon all the respondent's creditors, but upon such of them only as shall execute within a specified time, the limitation of time for execution by the creditors is not in cases of this nature of the essence of the contract, and creditors can come in and execute the deed after the expiration of the stipulated time. *Dunch v. Kent*, (a) *Spottiswoode v. Stockdale*, (b) *Broadbent v. Thornton*, (c) *Nicholson v. Tutin*, (d) *Raworth v. Parker*. (e) And in *Whitmore v. Turquand* (g) it was held, that a trust so framed was a trust for all the creditors of the debtors. *Harris v. Pettitt* (h), and *Re a disputed Adjudication*, (i) are to the same effect, and the principle is recognized by legislative enactment in the Bankrupt Law Consolidation Act, 1849, § 68, which remains still in force. The deed,

(a) 1 Vern. 260.

(d) 2 K. & J. 18.

(b) G. Coop. 102.

(e) *Ib.* 163.

(c) 4 De G. & Sm. 65.

(g) 1 J. & H. 444; 3 De G., F. & J. 107.

(h) 31 L. J. N. S. Ch. 552.

(i) 3 L. T. N. S. 634.

therefore, is in effect, as it was intended to be, a deed for the benefit of all the * respondent's creditors. As to the * 298 registration, it is at least *prima facie* evidence that all the conditions required by the statute have been complied with: *Ex parte Page*, (a) and the *onus* is consequently upon the appellants to show, which they have not yet done, that the facts are otherwise. The Act makes no distinction between registration under one section or the other, and the addition by the officer of the words "under section 194" cannot alter the statutory effect of registration. If some of the documents required by the General Order were wanting, the deed should have been sent back to have them supplied. The General Order in question is a very recent one and not generally known in the country, and in so early a case, when the statutory requisites have really been complied with, the Court would give an opportunity to the persons interested under the deed to supply the formalities required by the order. The use of the word "such" in the 198th section; in reference to the deed, the certificate of the filing and registration of which is by that section made available to the debtor as a protection in bankruptcy, grammatically construed, refers to the class of deeds mentioned in the 194th section as the last antecedent, at least as much as to any other class.

[THE LORD CHANCELLOR. — Treating this deed as one registered under the 194th section, what statutory effect is given to it so as to prevent a creditor who is not a party to it from treating it as an act of bankruptcy?]

Mr. Bacon replied.

Judgment reserved.

January 30.

* THE LORD CHANCELLOR. — It was the object of the leg- * 299
islature in passing the 192d section of the Bankruptcy Act, 1861, and the seven or eight subsequent sections, to give security to a private administration of an insolvent's estate against process at common law, and also against proceedings in bankruptcy. The

(a) *Supra*, p. 283.

case of *Tetley v. Taylor*, as decided in the Exchequer Chamber, had in effect nullified a great part of the benefits which would have resulted from the sections relating to deeds of arrangement contained in the Bankrupt Law Consolidation Act, 1849. As those sections are repealed, and it is therefore a decision which applies only to the construction of a portion of the statute law which is no longer in force, I may be permitted to say, with all respect, that I entirely dissent from that decision and that I think it was attended with unfortunate consequences. It seems to have been the intention of the framers of the 192d section of the Act of 1861 to avoid the same result as that which was the consequence of *Tetley v. Taylor*.

The case of *Tetley v. Taylor* was decided on this ground, that words of release, being conjoined with words of distribution, and winding-up of an estate, rendered every deed void which did not contain in it provisions for the distribution of the entirety of a debtor's estate. The effect was, that deeds of composition,—which are very frequently proceedings or dealings with part only of the debtor's estate, and which sometimes may proceed upon the acceptance of security given by third persons for the payment of instalments in satisfaction of the insolvent's debt,—were completely taken out of the operation of the Act of 1849. It will, therefore, be observed that in framing the 192d section the disjunctive conjunction “or” is used before the words “the * 300 distribution,” * for the very purpose of arriving at a different conclusion with regard to the deeds, which were to be valid and effectual under the 192d section. But I shall advert to that more fully hereafter.

In order to entitle the debtor to the benefit of the protection given by the subsequent clauses of this Act, it became necessary to impose certain conditions. Those conditions are embodied in the latter part of the 192d section, and one of the most material of those provisions is that relating to the registration of deeds. The principle that the majority of the creditors should be able to bind the minority was continued, with an alteration, from the Bankrupt Law Consolidation Act, 1849, in which six-sevenths in number and value of the creditors were required in order to constitute the statutory majority: whereas by the 192d section of the Act of 1861 a majority in point of number and three-fourths only in point of value are sufficient to bind the minority, provided certain condi-

tions be observed. As I have said, one of the most material of those conditions is the condition respecting registration. And the registration required is in a peculiar form. The deed is to be brought into the office of the chief registrar for registration. The manner in which that registration is to be effected is described in the 193d section. An abstract is to be made of the deed and entered in a book kept in the chief registrar's office for inspection, and the abstract so made is required to be advertised in the London Gazette. It will be found that all the subsequent sections giving protection to a deed of this description are sections dependent entirely upon that peculiar form of registration having been pursued.

Accordingly it will be found that the 196th section relates to registration only in the office of the chief registrar. In like manner, the 197th section, a most * important one, plainly * 301 relates only to such deeds as come within the 192d section — that is, deeds registered in the office of the chief registrar. Again, the 198th section begins thus, “after notice of the filing and registration of such deed has been given as aforesaid.” There is no antecedent direction on the subject of notice, except the direction that “the deed registered in the office of the chief registrar shall be advertised in the London Gazette.” The benefit, therefore, of the 198th section, which is most material, is given exclusively to those deeds which have been advertised in the manner I have mentioned. The 199th section, in like manner, refers entirely to deeds which have been duly registered in the manner prescribed by the 192d section. The 200th section also plainly refers to a deed of a similar description.

It is plain, therefore, that the protection intended by the statute to be given to a deed under the 192d section was a protection extending only to such deeds as should be duly registered in the manner and form required by that section and the 193d, which is consequent thereon. The immediate question which I have to determine is, whether the deed before me is a deed which has been so registered.

To determine that question it is necessary to observe, that in addition to the registration prescribed by the 192d and 193d sections, it appeared to the legislature expedient to require another form of registration for deeds which did not exactly comply with the requirements of the 192d section, and accordingly the 194th

section gives the power and imposes the obligation of registering any deed of composition or deed for the benefit of creditors, which has not been registered under the 192d section, in the Court of Bankruptcy; and the words are material. A deed under the 192d

section is to be registered by the deed being brought into * 302 the office of * the chief registrar and the solemnities attending its registration are distinctly defined. A deed under the 194th section is directed to be registered simply in the Court of Bankruptcy. For convenience' sake, by a General Order, I have given both forms of registration to the same officer and to the same office; but the registration under the one section is very different from the registration under the other section. The 194th section was introduced with a double view. First, because it was apprehended that many deeds of composition might still be made which would not be brought under the 192d section and which might have an injurious effect by reason of their being secret deeds of arrangement. The obligation, therefore, was imposed upon all persons, parties to such a deed, of bringing it in to be registered within twenty-eight days after its approval in the Court of Bankruptcy, and a penalty is attached in case of default, that the deed shall not be receivable in evidence. Another object of the enactment was this, it was felt that possibly many a deed of composition might not be perfected in the manner required by the 192d section within the twenty-eight days, and yet that all the creditors might afterwards be willing to accede to such a deed; and therefore power was given to register, under the 194th section, a deed which did not exactly comply with the requirements of the 192d section. These two forms of registration, therefore, being very different, the consequences of the one form do not attach to the other. The consequence of an observance, in every respect, of the terms of the 192d section is, that the deed is binding on the minority of the creditors who do not execute or assent to it. No such consequence is attached to registration under the 194th section.

The deed with which I have here to deal was brought * 303 into the office within twenty-eight days after the date of * its execution, but not in a manner which admitted of its being registered under the 192d section, and accordingly the person having charge of the deed elected to register it under the 194th section. The memorandum of the registrar endorsed upon it accordingly is that the deed has been registered pursuant to the

provisions of the Bankruptcy Act "under section 194." It is impossible, therefore, that that deed can now be set up as having been duly registered under the 192d section; and if it be not duly registered under that section, it is not binding upon the creditors who are not parties or do not assent to it. The practical result therefore is, that any creditor who is not a party to it, or did not assent to it, may deal with that deed as an act done by the debtor, not affected by section 192; and if that deed constitutes an act of bankruptcy, it is competent to a creditor, not bound by it, not being a party to it, actually or constructively, to treat it as an act of bankruptcy. The deed before me plainly is an act of bankruptcy, if it be not protected from that consequence by the enactment of section 192, because it is a deed conveying the whole of the debtor's property to trustees for the benefit of his creditors. That is unquestionably an act of bankruptcy, and therefore it was perfectly competent to the petitioning creditors, not being parties to that deed, not having assented to it, to avail themselves of it as an act of bankruptcy, and to require an adjudication of bankruptcy to be founded thereon.

But the matter does not rest entirely there. I regret to see the variety of determinations not consistent with one another that have taken place upon this 192d section. I think it is perfectly clear to any person who will examine the language of that section, that it was intended to be applicable only to deeds which contain provisions for the benefit of all the creditors. I entirely *agree with those determinations which have * 304 decided that if the trust-deed excludes any creditor, or the deed of composition excludes any creditor, the deed is not entitled to the benefit of the provisions contained in the 192d section. The question therefore is, whether this deed may be properly denominated a deed which, in its operation may exclude creditors of the debtor.

I think that that is the result of the particular form of the trust which is here declared; because the trustees are not to hold the property in trust for all the creditors, with a subsequent proviso imposing upon the creditors the obligation of coming in within a given time; but the trust is for such creditors as shall execute this deed within twenty-eight days from the date thereof: a form of trust which confines its operation to the class of creditors who shall come in and execute the deed within that period.

I am of opinion, that even had the deed been registered in conformity with the 192d section, this particular form of trust would have been inconsistent with its sustaining that character which, in my judgment, it is necessary that it should have to entitle it to the benefit of the 192d section.

Another point was urged before me, but which, for the reasons which I have given to support the conclusion at which I have arrived, it will not be necessary for me absolutely to determine. The point was this, that inasmuch as this deed contains a proviso that it should be lawful for the trustees to give up to the debtor property to the amount of 20l., it was not a deed for the distribu-

tion of the entirety of the estate, and therefore was not a
 *305 deed coming within the 192d section. That *argument proceeded entirely upon a repetition of the grounds taken in the Court of Exchequer Chamber as the basis of the decision in *Tetley v. Taylor*. I am not of opinion that the argument would have been valid or that I could have accepted that ground of determination if it had been the only ground on which this deed was assailed, because I think it clear that it is not required by the 192d section that a deed to be entitled to the benefit of that provision should be a deed comprising the whole of the property of the debtor. It is a strange thing to observe that the whole of the beneficial operations of the clauses relating to these deeds in the Act of 1849 was completely defeated by the determination in the Exchequer Chamber, involving as it did this consequence, that there was no possibility of making a valid arrangement by a deed, unless the debtor was stripped of the entirety of his property. But the very object of these powers and of transactions of this kind is to render it unnecessary to break up the debtor, to save the debtor from the necessity of having the whole of his property sold and converted into money, his trade establishment broken up, and the power of continuing his existing *status* as a trader entirely taken away. The language of the 192d section appears broader and to have been framed probably with the intention of meeting that decision. At all events, I am of opinion that what is called in that decision in the Exchequer Chamber the *cessio bonorum* — that is, the assignment of the entirety of a debtor's property — is not necessary for the validity of a deed of composition or trust under the 192d section.

The points which I decide for the purpose of the present motion

are these — that this deed was not registered under the 192d and 193d sections ; that it was intentionally * and by * 306 the submission of the parties registered under the 194th section ; that validity, as against the use now attempted to be made of the deed, is not given by the 194th section ; that the present petitioning creditors, therefore, are not bound by that deed, but may treat it as an act of bankruptcy, to which I think it amounts ; and further, I am of opinion that the fact of the particular trust being in very terms confined only to a certain class of the creditors gives the deed an exclusive character, which deprives it of the right of being treated as a deed which would have come within the operation of the 192d section if it had been registered in conformity therewith.

It appears that in the present case an adjudication of bankruptcy was originally made on this deed as an act of bankruptcy. The learned commissioner afterwards, on examining the deed, was of opinion that the case was taken out of the reach of his power to adjudicate, and he therefore dismissed the petition for adjudication. I think that I must reverse that order of dismissal ; and the consequence will be that the adjudication of bankruptcy originally made will stand. [His Lordship then, with reference to all the circumstances of the case, directed the costs of the appeal of both parties to be paid out of the estate, and proceeded as follows :] What I have decided is entirely consistent with the view taken by the Lords Justices. It should be particularly observed, as reference has been made to the Order of May last, which has a schedule drawing the distinction between the secured and unsecured creditors, that that distinction is most necessary by reason of the particular language of the 197th section, because as soon as a deed is entitled to the benefit of the 192d section it was the object of the legislature by the 197th section * to give to all par- * 307 ties under the deed the power of resorting to the Court of Bankruptcy whenever it might be necessary so to do. The object was to remedy the inconvenience which arose under trust-deeds, which but for that enactment might, in case of any error or misfeasance, have had to be construed or dealt with by a suit in Chancery. Accordingly the 197th section causes the state of things under a trust-deed to be precisely the same as it would have been had there been a bankruptcy instead of a deed, and therefore the creditors under a trust-deed are placed *in eodem statu* with

creditors under a bankruptcy. But creditors under a bankruptcy cannot prove without allowing for the value of their securities, and the creditors under a trust-deed are subjected to the same obligation.

Ex parte LAWRENCE LAWRENCE.

In the Matter of a Deed of Assignment, filed &c., by WILLIAM BEALE, of, &c.

1863. May 22. Before the Lord Chancellor Lord WESTBURY.

The commissioner has power either under the 136th section of the Bankruptcy Act, 1861, or irrespectively of that section by virtue of his authority over the trustee appointed by a trust-deed within the Act, to direct the trustee to be examined as to his dealings with the debtor's estate: and although it will be a good practice not to direct such examination without some ground being shown for it, the Court of appeal will not in general entertain an appeal as to the sufficiency of such ground.

THIS was an appeal from an order of Mr. Commissioner FANE, directing a warrant to issue to commit the appellant to the Queen's debtors' prison for London and Middlesex, there to remain without bail until he should submit himself to the Court to be sworn.

* 308 * By an indenture dated the 11th of January, 1862, and duly registered, William Beale assigned his property to trustees upon trusts for the benefit of his creditors, the trustees being Thomas William Hunt and the appellant. Certain creditors of the debtor being dissatisfied with the proceedings of the trustees applied for and obtained from the registrar an order requiring them personally to be and appear before him on the 23d of February, 1863, "then and there to be examined by virtue of the statute in such case made and provided." Hunt appeared and was examined accordingly: the appellant did not, explaining his absence through his solicitor. A second summons was issued by the registrar, requiring the appellant personally to be and appear before him on the 2d of March, 1863, "then and there to be examined by virtue of the said petition (a) and the statute in such

(a) There was, in fact, no petition.

case made and provided." The appellant then attended, but objected to be sworn, principally on the ground that the summons ought to have alleged some "claim, dispute, or difference" between the creditors at whose instance it was issued and himself as trustee, such as might give the Court jurisdiction to interfere under the 136th section of the Bankruptcy Act, 1861. (a) The matter was referred to the commissioner, who upon the appellant persisting in his refusal to be sworn made the order under appeal. To negative an objection on the part of the appellant, that he had not been apprised of the matters on which it was proposed to examine him, it was in evidence on behalf of the creditors at whose instance the summonses were issued, that on the 20th of February, 1863, notices were served upon each of the trustees, requiring them to produce at the time and place fixed by the summons, all books, papers, accounts and reckonings between them and each of them and the creditors of William Beale; also, * all vouch- * 309 ers for payments of money made by them in respect of the estate, and also a statement of the receipts in relation to the same, and more particularly a full statement of account showing the disposal and realization of the property belonging to the estate, and also an account of goods supplied for the carrying on of the business since the deed of assignment, together with their ledger, cash-book, day-book, purchases and sales book, waste-book and invoices. Reference was also made with the same object to a correspondence on the subject which had passed between the solicitors of the respective parties, and to the form in which the application for the examination had been made to the Court, and which stated that it was intended to examine the trustees "touching the statement of accounts and disposal and realization of the estate of the said William Beale."

Mr. Swanston, for the appellant. — The terms of the summons were insufficient, as the appellant should have been informed by it upon what points it was proposed to examine him. The circumstance of the summons having been signed by the registrar only, and not by the commissioner, shows that the commissioner, who, alone, if any one, is entitled to exercise a discretion to issue it, never exercised his discretion in the matter. Moreover, an ex-

(a) Stated above, p. 267, note.

amination could only be "as to any matters and things concerning the bankruptcy or trust estate;" Bankruptcy Act, 1861, § 136; and in the present case there was no "claim, dispute, or difference," to justify interference under that section.

Mr. Bagley, for the three creditors at whose instance the summons had been granted, was not called upon.

* 310 * THE LORD CHANCELLOR. — A trustee under a trust-deed stands in the same relation to creditors under the deed as that in which an assignee stands under an adjudication of bankruptcy to creditors who have proved. It was the bounden duty of this trustee to submit to the required examination under the 136th section. It would be better, possibly, in practice that a summons for the examination of a trustee should not be granted by the commissioner without some *bond fide* ground being shown for the application. If, however, the commissioner thought it right that the appellant should be examined, I will not undertake to determine the sufficiency of the grounds on which the commissioner came to that conclusion. Some limits must be set to applications of the present nature, and some distinction drawn between appeals where the commissioner arrives at conclusions upon matters of contention between parties and cases where he arrives at conclusions upon matters of discretion. It is not at all necessary to rest the order made in the present case upon the words in the 136th section of the Bankruptcy Act, 1861, although that section contains abundant authority for what the commissioner has done. For it is enough that the relation of trustee and *cestui que trust* has been created, and that the latter desires information respecting the trust estate. If a summons were taken out as of course, and upon its coming before the commissioner he were to think the case one in which the creditors' assignee or trustee summoned ought to be examined, the commissioner's decision would operate retroactively; and the assignee or trustee cannot be allowed to fence with the Court and to obstruct its procedure. He must, at any rate, be ready to do at the bidding of the commissioner

* 311 that which he is bound to do at all times. The * present application is groundless and must be refused with costs.

Ex parte WILLIAM ALEXANDER.

In the Matter of a Trust-Deed between ROBERT THIN and WILLIAM HEDDLE FLETT and their Creditors.

1863. May 30. July 18. Before the Lord Chancellor Lord WESTBURY.

Trustees and creditors under a trust-deed operating under the Bankruptcy Act, 1861, § 192, and duly registered, are entitled to the same powers, rights, and privileges as are possessed by assignees and creditors under an adjudication in bankruptcy, including the power of summoning witnesses.

Seem, that the jurisdiction of the Court of Bankruptcy to summon persons under the 197th section of the Act of 1849, for the purposes of discovery, should be exercised with care, circumspection, and judicial discretion, and not in a merely ministerial way.

THIS was an appeal from an order of Mr. Commissioner PERRY, of the Court of Bankruptcy for the Liverpool district, discharging a summons issued by the registrar at the request of the appellant, who was trustee of a deed executed in the form of Schedule D to the Bankruptcy Act, 1861. By the summons, the respondent Lawrence Joyce was required personally to be and appear before the Court of Bankruptcy at Liverpool on &c., then and there to be examined by virtue of the statute in such case made and provided; and then and there to bring with him and produce all books of account, accounts, invoices, sale notes, contracts, letters, papers, and writings in any wise relating to or showing the transactions between him and the late partners, or either of them, and the dealings and transactions by him with and in respect of the goods and property of the late partners, or either of them, in his possession or power at the time when the trust-deed was executed.

It appeared that the ground of the decision under appeal was, that there was no evidence, except the certificate * of * 312 the chief registrar, to show that the deed had been executed or assented to pursuant to the provisions of the Bankruptcy Act, 1861.

Mr. W. M. James and *Mr. Bardswell*, for the appellant. — The commissioner thought that the chief registrar's certificate was not sufficient evidence of the fulfilment of the conditions specified in

the 192d section of the Bankruptcy Act, 1861, (a) to enable him to exercise jurisdiction in the matter, and summon the respondent as a witness. That was a conclusion which, pressed to its legitimate extent, would require that on every occasion when a witness is summoned there should be a preliminary issue joined and tried between the witness and the trustees as to the existence of the requisites to the validity of the deed, for the purpose of binding non-assenting creditors, — an issue which would thus have to be tried over and over again (the result in the case of one witness not binding another), at the expense of so much time and money as to render the provisions of the Act unavailable. This could not have been intended by the legislature, and, we submit, is not according to the true interpretation of the Act. The scope of its 192d and following sections is to substitute for an administration in Court an administration out of Court merely: and under the 197th section the registration of a deed confers upon the commissioner similar powers, including that of summoning witnesses, to those which an actual adjudication of bankruptcy would have conferred upon him.

Mr. North, for the respondent. — If it be said that the * 313 scope of the 192d and following * sections of the Bankruptcy Act, 1861, is to substitute an administration out of Court for an administration in Court, that is an admission which brings with it ground for the argument, that trustees of a deed operating under the 192d section are not intended to be placed in the same position with assignees in bankruptcy. But even assuming, that, under the 197th section of the Act, the trustees of such a deed could set in motion this extraordinary power of the Court of Bankruptcy, it cannot be said that such authority is vested in the trustees of a deed not falling within that category. It is incumbent therefore upon the appellants to show, and the respondent has a right to require that the Court shall be satisfied of, the due fulfilment of all the conditions specified in the 192d section of the Act. Of this the registration of the deed could be at the utmost *prima facie* evidence: *Ex parte Page*; (b) and is not I

(a) The material sections referred to during the arguments, and in the Lord Chancellor's judgment, will be found set out above, pp. 230, *seq.*, note; p. 242, note, and p. 267, note.

(b) *Supra*, p. 283.

submit, even that. For not only is the Bankruptcy Act, 1861, silent as to the effect of registration as evidence, and not only does it, by providing in its 198th section that the certificate of the filing and registration of the deed shall be available to the debtor for all purposes as a protection in bankruptcy, virtually imply that such certificate shall not be available for any other purposes, but it contains no provision such as that which was contained in the 226th section of the Bankrupt Law Consolidation Act, 1849, making such certificate *prima facie* evidence of the facts to which it relates. No attempt therefore having been made in the present case to offer other proof of the matters to which the certificate related than the certificate itself, the summons was properly discharged.

He also referred in support of his argument to the 136th, 194th, 197th and 198th sections of the Bankruptcy Act, 1861.

* The Lord Chancellor, during the argument, referred to * 314 the terms of the 120th section of the Bankrupt Law Consolidation Act, 1849, and adverted to the successive changes which had been made in the bankrupt law as to the necessity of proving on every occasion the validity of the adjudication. And his Lordship having desired to hear further argument as to the course of practice of the Court of Bankruptcy with respect to granting summonses for the examination of persons suspected of having the bankrupt's property, &c., the case stood over for that purpose.

July 18.

Mr. James and *Mr. Bardswell*, for the appellant. — The power of causing witnesses to be summoned in bankruptcy has been given to creditors from the earliest times, having been so given originally by the first Bankrupt Act, 34 & 35 Hen. 8, c. 4, § 2, and it has been continued through the subsequent bankruptcy statutes, 13 Eliz. c. 7, § 5; 1 Jac. 1, c. 15, § 10; 6 Geo. 4, c. 16, § 33, and the Bankrupt Law Consolidation Act, §§ 120, to the present time. It is a sufficient ground for the issue of such a summons that the assignees suspect the person against whom the summons is sought of having part of the bankrupt's estate in his possession, and the issue of such a summons is *ex debito justitiæ* and not in the discretion of the commissioners. *Cooper v. Harding*. (a)

(a) 7 Q. B. 928.

Mr. North, for the respondent. — The jurisdiction of the Court of Bankruptcy to issue summonses for the examination of
 * 315 persons suspected of * having parts of a bankrupt's estate in their possession, otherwise than on the motion of the Court of Bankruptcy itself, is one capable of being made the instrument of great oppression, vexation and injustice, and ought not to be extended to other cases than those of actual bankruptcy. At any rate, I submit that the Court, before allowing its process to be set in motion at the instance of the trustee of a deed, should itself exercise some discretion in the matter, which it has not done here.

He also referred to the Bankruptcy Act, 1861, §§ 136 and 189, and argued that the introduction into those sections of express enactments, conferring the powers now in question, showed that the omission of similar provisions in the case of deeds operating under the 192d and following sections was intentional on the part of the legislature, and could not be supplied under the terms of the 197th section.

THE LORD CHANCELLOR. — I have always thought that the power which is here brought in question was one of a singular and anomalous character, and but little reconcilable with the principles upon which English jurisprudence and the administration of justice in this country usually proceed. Still if it is a power which has been possessed by assignees in bankruptcy, if it is a right of the assignees or a remedy of creditors under an adjudication to call for the exercise of such a power, I think that as a matter of course a corresponding power, right and remedy are given to the trustees of a registered deed and to the creditors entitled to the benefit of the deed. It was, therefore, with a desire of ascertaining how far the power of summoning persons suspected of having part of the estate of the bankrupt in their possession, or of being
 * 316 indebted to him, to appear in * the Court of Bankruptcy without the ordinary protection which in a suit filed for discovery is afforded to the defendant, was the right of assignees or creditors under a bankruptcy that I desired the matter to stand over.

The 197th section of the Bankruptcy Act, 1861, provides: [His Lordship read it.] It would, I think, have been much better if the bankrupt law had made this particular power exercisable by the

Court alone, and only after the existence of sufficient grounds to warrant its exercise had been judicially ascertained. The precedents, however, in the Court of Bankruptcy, confirmed as they are by the decision of the Court of Queen's Bench, to which reference has been made, show that according to the present practice in bankruptcy (which is nothing more than a continuation of the practice which has existed for a very considerable time) this right or power is considered as an ordinary "right or remedy" of assignees or creditors. The decision in *Cooper v. Harding* goes to the length of holding that the commissioner not only is warranted but is required to grant a summons almost as a matter of course, upon being informed that an assignee or a creditor, or the solicitor who has acted in obtaining the adjudication, entertains the suspicion or the supposition that the person whom he wishes to summon has property of the bankrupt in his possession, or is indebted to the bankrupt.

I should be glad if in future this power should be exercised by the Court alone, and if the commissioner, instead of acting in a merely ministerial way, should think it his duty to require some evidence upon oath to be laid before him, upon which a *prima facie* case may be made, warranting such a suspicion or supposition, and upon which the application may be justly granted. It is intolerable that a power of this kind should exist by * which * 317 the liberty of the subject may be invaded, and that a man may be summoned and tortured by questions in a Court of limited jurisdiction, a Court sitting solely for the benefit of persons whose interests are adverse to his own, and that he should be compelled to answer those questions without the protection which other Courts afford to persons in his position.

I am bound, however, to hold that trustees or creditors under a trust-deed have the same rights as assignees and creditors in the case of a bankruptcy; whence it follows that the commissioner is bound to grant a summons at the instance of persons claiming under a trust-deed just as he is bound so to do at the instance of assignees and also creditors under an adjudication. I say also creditors, having regard to the language of the Bankrupt Law Consolidation Act, 1849, § 120, which enacts that "after adjudication it shall be lawful for the Court to summon," &c., — that is to say, before the appointment of assignees, and as soon as adjudication has been made. The power is, I repeat, one which, in my

judgment, should be exercised with more care and circumspection and with more of judicial discretion than have hitherto apparently attended its exercise; although I am bound to say that the existing practice is justified by the language attributed to the Judges of the Court of Queen's Bench in the case of *Cooper v. Harding*.

The order of the commissioner must be discharged and the matter remitted back to him, with a declaration that the trustees and creditors under the trust-deed, it having been duly registered, are entitled to the same powers, rights and privileges, including that of summoning witnesses, as are possessed by assignees and creditors under an adjudication in bankruptcy.

In the Matter of the Assignment of WALTER JOSEPHS.

1863. May 6. July 30. Before the Lord Chancellor Lord WESTBURY.

A trust-deed for the benefit of creditors containing provisions for the application of the whole of the estate of the debtor in payment of his debts as in bankruptcy, contained a clause purporting to empower the trustee to pay or make such arrangements with the creditors whose debts were under 10*l.*, and to pay the costs, if any, of the creditors proceeding against the debtor for the recovery of their debts, as the trustee might deem expedient. *Held*, that the clause did not in either of its branches prevent the deed from binding non-assenting creditors under the Bankruptcy Act, 1861, § 192: not in the former branch, as it only purported to give a power which, being repugnant to the rest of the deed and the law, could not be exercised: nor in the latter, as that branch might afford the means of preserving the assets for equal distribution amongst the creditors.

Seemle, that the whole effect of the 197th section is to give to a trust-deed when duly registered a comprehensive effect upon all the estate and effects of the debtor comprised in the deed and the particular operation of making the position and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under an adjudication in bankruptcy.

Seemle, also, that secured creditors under such a deed rank for the amount remaining after deduction of the value of their securities.

Seemle, also, that the words in the 197th section, "except where the deed shall expressly provide otherwise," refer to the insertion in the deed of a proviso for questions being settled by arbitration, or for the adoption of some different rule of administration from that adopted in bankruptcy, as, for example, with respect to joint and separate creditors.

THE appellant was the trustee of a trust-deed registered under the 192d section of the Bankruptcy Act, 1861, and the appeal was from the decision of Mr. Commissioner FANE, dismissing the appellant's petition, which sought a declaration that the respondents were not entitled to a specific lien on part of the trust property.

The trust-deed was an indenture, dated the 5th of September, 1862, and made between Walter Josephs of the first part, the appellant therein described as "trustee * for himself * 319 and the rest of the creditors of the said Walter Josephs" of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being, respectively, creditors of Walter Josephs of the third part. It contained a recital to the effect, that Walter Josephs had lately carried on business under the style of Walter Josephs & Co. ; and another recital, which was in the following terms : " And whereas the said Walter Josephs has become, and is now justly and truly indebted unto the said several persons parties hereto of the second and third parts, in the several sums of money set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full ; and he hath therefore proposed and has agreed to assign all his estate and effects unto the said Jones Spyer, for the benefit of his creditors, as hereinafter mentioned."

By the witnessing part of the deed, Walter Josephs assigned to the appellant, his executors, administrators, and assigns, all and every the stock in trade, goods, wares, merchandises, books of account, debts, sum and sums of money, and all securities for money, vouchers and other documents and writings, and all other the personal estate and effects whatsoever and wheresoever of Walter Josephs, except leasehold estates and shares in any company or undertaking, in possession, reversion, remainder, or expectancy, upon trusts of the ordinary kind for collection and realization. The proceeds were to be held upon trusts thus expressed : " in the first place, to retain and reimburse himself all costs, charges and expenses of preparing, and making such sales respectively and attending the recovery, collecting, and getting in the said debts and other trust moneys, together with commissions and allowances usual among merchants ; and also all costs, charges and expenses of proposing, * preparing, engrossing, * 320 and executing these presents, and incident thereto, including

therein the costs, charges, and expenses incurred in respect of meetings and other business preliminary thereto; and also to pay all salaries, wages, charges, and allowances to be made to clerks, accountants, agents, and subordinates; and, in the last place, shall pay, retain, and satisfy ratably and proportionately, and without any preference or priority, to the said Jones Spyer, and the other persons parties hereto of the third part who shall execute these presents, the several debts or sums of money set opposite to their respective names in the said schedule hereto, and all other the creditors of the said Walter Josephs, subject to the covenant hereinafter contained for verifying the amounts thereof, and to pay the residue (if any) of the said moneys unto the said Walter Josephs, his executors, administrators or assigns."

Then followed a provision, enabling the appellant to employ Walter Josephs, or any other person or persons, as managers, accountants, clerks, agents, or collectors, in winding up the affairs of the estate, and in collecting and getting in the trust estate and effects, and in carrying on the business if thought expedient by him, and to allow Walter Josephs, or any other person or persons so employed, out of the trust estate such sum and sums as to the appellant should seem proper. Then came ordinary trustee clauses, and a power of attorney from Walter Josephs to the appellant, expressed to be given "with the consent of the said several creditors parties hereto of the third part."

The deed proceeded to the following effect:—

"Provided always, and it is hereby covenanted and agreed by and between the several parties hereto, that it shall be law-
 * 321 ful for the said Jones Spyer, at the * expense of the said trust estate, to require the amount of any debt or debts of any or either of the several creditors, parties hereto, to be verified by solemn declaration or in such other manner as to the said trustee shall seem expedient, and in the event of any such creditor or creditors refusing or failing so to verify his or their debt or debts, or declining to execute these presents, then such creditor or creditors so refusing or failing or declining as aforesaid shall lose all benefit, dividends, and advantage to be derived from or otherwise claimed under these presents, any thing herein contained to the contrary notwithstanding. And, thereupon, the said Jones Spyer is hereby authorized and empowered (but it is not incumbent on

him) to pay such last-mentioned dividends or dividend unto Walter Josephs, his executors, administrators, or assigns: and the said Jones Spyer is hereby authorized and empowered to pay or make such arrangements with the creditors whose debts are under 10*l.*, and to pay the costs, if any, of the creditors proceeding against the said Walter Josephs for the recovery of their debts, as he the said Jones Spyer may deem expedient."

The deed contained a proviso and agreement, that any resolution signed by the majority in number and value of the creditors, parties to the deed, should be binding on all the several "creditors hereto," and should be effectual for the allowance and passing of the accounts of the appellant, and for discharging him from the trusts of the deed, and from all claims and demands in respect thereof: and that all questions relating to the trust estate should be decided according to English bankrupt law; followed by further trustee clauses. Then came a general release on the part of the creditors, parties thereto "of the second and third parts," but without prejudice to securities and rights against persons other than Walter Josephs.

* There was also a covenant on the part of Walter * 322 Josephs, at the request of the appellant, and at the expense of the trust estate, to convey, surrender, assign, or otherwise assure all freehold, copyhold and leasehold estates and shares of or to which Walter Josephs was then seised, possessed, interested or entitled in possession, reversion, remainder, or expectancy, subject to any encumbrances affecting the same or any part or parts thereof, to the appellant, upon the trusts aforesaid, or in such other manner as he should direct. And there was a proviso avoiding the release, in the event of Walter Josephs having concealed or kept back any part of his estate or effects to the value of 20*l.*

The deed was assented to by the requisite majority, including the respondents, whose several assents, however, were as follows: "We object to execute such deed as we claim a specific lien upon the proceeds of certain goods, which constitute a considerable part of our debt; but, subject and without prejudice to our claim to be paid specifically out of such proceeds, we assent to and approve of such deed of assignment."

The deed having been registered under the 192*d* section of the

Bankruptcy Act, 1861, (a) the appellant Jones Spyer, the trustee, presented the above-mentioned petition to the Court of Bankruptcy, for the purpose of contesting the respondent's claim to a specific lien. On this petition, the commissioner expressed his opinion that several of the provisions of the Act of Parliament had * 323 not been observed, and that he was therefore unable * to proceed further in the matter, and made the above-mentioned order of dismissal, with costs; which, however, the commissioner thought, ought to be paid out of the trust estate.

Mr. Bacon and Mr. Roxburgh, for the appellant. — The objections urged against the case of the appellant on the part of the respondents in the Court below were these. It was said, that the deed was not one within the protection of the 192d section of the Bankruptcy Act, 1861: first, because a portion of the debtor's property was excluded from the assignment; secondly, because the trustee was authorized to return a part of the debtor's property to the debtor; thirdly, because the trustee was empowered to pay creditors under 10*l.* in full, and to pay the costs of creditors proceeding against the debtor; and fourthly, because creditors who did not execute the deed were excluded from its benefits. In the next place, it was argued that secured creditors should have been reckoned at the full amount of the sums due to them, in computing the statutory majority of creditors executing, assenting to or approving the deed: and, lastly, it was contended that as the respondents had not, as was contended, submitted and did not submit to the jurisdiction of the Court of Bankruptcy, that Court had no jurisdiction to decide, as against them, the question of lien.

[*Mr. Sargood*, for the respondents, admitted that after deducting the values of securities held by secured creditors, the majority of creditors required by the first condition of the Bankruptcy Act, 1861, sect. 192, had been obtained. He also stated that, * 324 after *Ex parte Morgan*, (b) * he did not intend further to

(a) The material sections of the Acts of Parliament referred to during the arguments, and in the judgment, in the present case, are set out above, p. 230, *sqq.*, notes, and p. 267, note.

(b) *Supra*, p. 288.

press the objection that secured creditors were not reckoned at the full amount of the sums due to them, or the objection, that the leasehold property and shares of the debtor were improperly excepted from the assignment.]

Then the trust here is not for some only of the creditors as it was in *Ex parte Morgan*, but is for all. The subsequent provision, that creditors declining to execute the deed shall be excluded, cannot invalidate it. For no application for them to execute the deed would be made, their assent or approval being sufficient even for the purpose of constituting a majority; and even where a time is fixed for the execution of the deed, a creditor is not excluded who comes in afterwards. *Whitmore v. Turquand*. (a) As no creditor is excluded, the deed is within the terms of the 192d section; and any of this debtor's creditors could, by application to the trustee, or, if necessary, by applying under the Bankruptcy Act, 1861, to the Court of Bankruptcy, have obtained his dividend. There remains the objection as to the jurisdiction; but that is answered, if not by the enactment contained in the 136th section of the Act of 1861, by the enactment contained in the 197th section.

[THE LORD CHANCELLOR. — Is not this question involved in the other? If the deed is a valid deed within the 192d section, are not the respondents bound by it in their capacity of creditors? If they are bound by the deed, the Court has jurisdiction over them.]

Quite so: and it cannot be worth the respondents' while to upset the deed in bankruptcy, simply for the purpose of having the question of their specific liens determined by a suit in equity. But, however that may be, the respondents have, as a matter of fact—save with * respect to this one question * 325 of their specific liens—assented to this deed.

Mr. Sargood, for the respondents. — This is a deed for the benefit of the debtor, not for the benefit of the creditors; and it is open to several objections. It is true, that the division is to be made amongst the trustee and the creditors who shall execute,

(a) 1 J. & H. 444; 3 De G., F. & J. 107.

and all other the debtor's creditors ; but that is subject to a proviso and covenant by the parties to the deed, that they must verify the amounts due to them as the trustee may require, and that any creditor who fails so to verify or declines to execute the deed shall be excluded, and that the dividend of such creditor may be paid to the debtor.

[THE LORD CHANCELLOR. — The clause being of the nature of a clause of forfeiture should be construed strictly. So construed, it is nonsense ; for it is to operate in the event of some of the parties to the deed, of the third part, declining to execute it ; those parties being expressed to be persons whose names and seals are subscribed and set to the deed.]

Again, the trustee is authorized to make such arrangements with the creditors the debts due to whom are under 10*l.*, and to pay the costs of the creditors proceeding against the debtor for the recovery of their debts, as the trustee may deem expedient. Each of these provisions contravenes the spirit of the Act of Parliament by subverting that due equality amongst the creditors which, as it was required in the case of arrangements by deed under the Bankrupt Law Consolidation Act, 1849, *Gardner v. Chapman*, (a) so should obtain in deeds of the like nature under the Bankruptcy Act, 1861. Finally, the Court of Bankruptcy had no juris-

* 326 diction in the matter, whether the deed was good * or bad, for it is the case both of the appellant and of the respondents, that the latter are, as regards the securities, which they claim, and their rights to them, strangers to the deed, who have not in any way submitted to the jurisdiction of the Court of Bankruptcy, and over whom that Court, consequently, has no control. Neither the 136th nor the 197th section, relied on on the other side, gives that control ; the former applying only to persons claiming under a trust-deed ; and the latter to creditors bound by the deed ; and the respondents prefer to try any questions which may arise in connection with their specific liens before the ordinary tribunals of the country.

Mr. Roxburgh (who was desired to confine his reply to the argument, as to the inequality created amongst the creditors by the

(a) 8 C. B., N. S. 317.

provision in the deed empowering the trustee to make arrangements with creditors, the amounts due to whom were respectively under 10*l.*), in reply. — With regard to the argument that this provision is contrary to the spirit of the Act, and creates an inequality amongst the creditors, the answer is, that the language of the 192*d* section of the Bankruptcy Act, 1861, in the seventh condition specified in that section, does not mean an equal distribution, necessarily, but a distribution according to the contract between the parties ; as appears from the 197*th* section, which shows that the legislature contemplated the case of a deed operating under these sections, although it may provide, that the distribution should be otherwise than as in bankruptcy. The introduction, therefore, of the clause, which is a contract between the parties, does not invalidate the deed, as one intended to operate under the 192*d* section.

*THE LORD CHANCELLOR. — The only difficulty I feel is * 327 upon the clause providing for arrangements with creditors the amounts due to whom are respectively less than 10*l.* The power given to the trustee of paying the costs of creditors proceeding against the debtor for the recovery of the amounts due to them, I do not think objectionable. It might be the means of preserving the assets for equal distribution.

Judgment reserved.

July 30.

THE LORD CHANCELLOR. — This was an objection to the validity of a trust-deed, founded upon the circumstance that in the deed is a power given to the trustee of paying in full creditors under 10*l.* It is a power without any obligation to exercise it, — a power committed entirely to the discretion of the trustee. It was said, that to pay these creditors in full was at variance with the rule of administration in bankruptcy, and that, therefore, the deed was avoided. If it had been a trust, or absolute direction to pay, there might have been ground for the objection ; but, inasmuch as the deed professes only to give liberty to the trustee, if the exercise of that liberty be at variance with the duty and obligation of the trustee, as declared by the rest of the deed and the law applicable to it, then the liberty, being repugnant to the higher duty, is

simply a power which the trustee has no right to exercise.

* 328 I must, therefore, hold that the power is no objection to * the validity of the deed ; but that the power being repugnant to the duty of the trustee cannot be exercised by the trustee.

Much misapprehension has arisen with regard to these trust-deeds, from not attending to the full effect and meaning of the 197th clause of the Act of 1861. There is, undoubtedly, some obscurity in the antecedent enactments of the section 192, arising in a great degree from amendments and alterations that were made in the language of the original bill ; but, nevertheless, it is clear that the operation and effect of a trust-deed, duly registered in conformity with the 192d section, are defined with accuracy by the 197th section. If such a deed has been duly and completely registered under the 192d section, that deed has the full operation and effect attributed to it by the 197th section, and it subjects the whole estate and effects of the debtor comprised in the deed to be applied for the benefit of his creditors ; and the rights of the creditors are defined by and must be collected from the 197th section. Creditors, under a deed of trust, are put in the same position as that in which creditors under an adjudication are placed by the bankrupt law. Secured creditors therefore rank under the deed of trust for the amounts remaining after deduction of the value of their securities.

With regard to the doubt that has been suggested, whether the deed of trust affects the whole of the estate of the bankrupt, it is positively declared by the 197th section, that the creditors shall have the benefit in like manner as if the debtor had been adjudged a bankrupt ; and that the trustees and the creditors shall in all matters relating to the estate and effects of such debtor (words which are used without any qualification or deduction)

* 329 * be subject to the jurisdiction of the Court of Bankruptcy, and shall have the benefit of the provisions of the Act, in the same or like manner as if the debtor had been adjudged bankrupt and the trustees had been appointed assignees. Then follows a provision, that except the deed directs otherwise, with respect to jurisdiction, the Court in bankruptcy shall have plenary jurisdiction to decide every question. Now, that exception refers to what may very naturally be put into a deed, a proviso for questions being settled by arbitration. It may be also possible, that some different rule of administration may be adopted, as, for example,

that there should be no distinction between joint and separate creditors; but the whole effect of this 197th section, if it be properly attended to, construed, and appreciated, is to give to the deed the moment it attains the character of being a duly registered deed a comprehensive effect upon all the estate and effects of the debtor comprised in the deed, and the particular operation of making the position and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under an adjudication in bankruptcy. This is still further exemplified by the 200th section; for where it is not competent to have a deed that shall answer entirely the requisites of the 192d section, the model deed which is given by the schedule conveys all the estate and effects of the debtor in like manner as if he had become a bankrupt. It is further illustrated by the 198th section, which deprives the creditor, who has assented to the deed of trust, or is bound by the deed of trust, from having recourse to any process whatever against either the estate or the person of the debtor.

I am, therefore, of opinion in the present case, that the objection is not well founded. The deed of trust * states * 330 an intention to have the whole estate of the debtor administered as if it were a case of bankruptcy, and that the debts shall be paid to the creditors and all questions relating to the trust estate decided according to English bankrupt law. The particular power or liberty given to the trustee is, therefore, repugnant to and inconsistent with the general tenor of the deed, and with the enactments under which the deed now comes. I therefore hold, that that power cannot be exercised, and that it forms no objection to the validity of the deed and the capacity of registering it under the statute.

Ex parte SAMUEL MENDEL.

In the Matter of JOHN MOOR'S ASSIGNMENT.

1864. January 20. February 10. Before the Lord Chancellor Lord WESTBURY.

The 153d section of the Act of 1861, providing for the admission of a proof when a bankrupt is, at the date of the adjudication, liable to a demand in the nature of damages which are unliquidated, only applies to cases in which the cause of action is complete before the adjudication.

The date of a trust-deed in the form set out in schedule D. to the Act of 1861, is that of the supposed adjudication to which the 197th section refers.

THIS was an appeal from an order of Mr. Commissioner AYRTON, of the Court of Bankruptcy for the Leeds district, rejecting a proof under a trust-deed.

John Moor, who was a seed crusher, entered on the 28th of July, 1862, into a contract with Samuel Mendel for the sale to him of ten tons of oil at 36s. 6d. per hundred weight, good iron-bound casks included, to be delivered free to craft or trucks, during the month of January, 1863, and also into similar contracts with Mr. Mendel, for the sale and delivery to him of similar quantities of oil, during each of the months of February, March, April, May, and June, at prices specified in the contracts.

* 331 * On the 30th of January, 1863, Mr. Moor executed to the respondents a deed of assignment for the benefit of his creditors, in the form given in schedule D. to the Bankruptcy Act, 1861, (a) and did not fulfil any of the contracts for the delivery of oil into which he had entered with Mr. Mendel. On the 26th of February, 1862, the deed was registered under the Bankruptcy Act, 1861, § 192. Mr. Mendel claimed under the 153d and 197th sections of the Bankruptcy Act, 1861, to be admitted to prove against the trust estate under the deed, in respect of unliquidated damages for the breach of Mr. Moor's contracts, deposing that he had been by the non-delivery of the oil compelled to purchase and had purchased other oil at prices which he stated, and that his

(a) See it and the other sections of the Bankruptcy Act, 1861, referred to in the arguments and judgment in the present case, stated above, pp. 232, *seq.*, note, and in note (b) on next page.

consequent loss had been 1646*l.* 16*s.* 6*d.* He now appealed from the rejection by the commissioner of the proof so tendered.

Mr. Daniel (*Mr. Sargood* with him), for the appellant. — The question is, whether, under the 153d section of the Bankruptcy Act, 1861, (a) this is a provable debt. The law as it stood previously to the passing of the Bankrupt Law Consolidation Act, 1849, was not sufficiently extended by the 178th section of that Act, which * provides for the admission of proofs for * 332 contingent liabilities, and which came in question in *Ex parte Todd*, (b) and *Ex parte Barwis*. (c) The 153d section of the present Act was intended to comprehend cases such as arose in *Green v. Bicknell*, (d) where a contract was broken before the bankruptcy, and also such as arose in *Boorman v. Nash*, (e) where a contract was entered into before, but was broken after, the bankruptcy of one of the contractors. In neither of those cases was the demand held to have been provable. The defect in the state of the existing law in this respect having been often complained of, it is presumable that the legislature in applying itself to the question of devising a remedy by the 153d section of the Bankruptcy Act, 1861, meant that remedy to be full and complete. The presumption being in favour of a liberal construction of the provision, I submit that that presumption is not contravened by the language of the section. The statute does not require the demand to be in respect of a contract broken. Liability exists under a contract although it has not been broken, and the word "liable" should be construed to include demands actual or possible, present or future.

Again, the date of the supposed adjudication of bankruptcy in

(a) Which enacts as follows: "If any bankrupt shall at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a Court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be provable as if a debt due at the time of the bankruptcy: provided that, in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a Court of Law."

(b) 6 De G., M. & G. 744.

(d) 8 Ad. & El. 701.

(c) *Ib.* 762, 769.

(e) 9 B. & C. 145.

the 197th section is not, as the commissioner has assumed, the date of the execution of the deed, the 30th of January, 1863, but the date of its registration, the 26th of February, 1863. Otherwise, if it should be held that the present is not a case within the 153d section, the appellant will lose all benefit under the deed, and at the same time be debarred by the effect of the 199th section from taking other proceedings.

* 333 * *Mr. Bacon* and *Mr. De Gex*, for the respondents, the trustees of the deed of assignment. — The object of the provision appears clearly from its terms. It was to remove the objection arising from the damages not being liquidated, not that arising from their not having been incurred. When the legislature has attempted to provide for the proof of future or contingent demands, it has accompanied the provision with machinery for the purpose of doing justice to other claimants, and prevent the administration of the assets being delayed by the newly introduced species of proof. Thus, when future debts were first made provable, a rebate was directed to be made; next, when contingent debts were introduced by the 6 Geo. 4, c. 16, § 56, which was repeated in the 177th section of the Bankrupt Law Consolidation Act, 1849, a provision for valuation was also introduced, which now forms part of the last-mentioned section, and so essential a part was the machinery considered of the provision, that contingent debts not capable of being valued were at first held not provable. Although that was not followed, yet *In re Gales*, (a) and the cases there referred to, show with what care the provision was applied. The contingent liability clause of the Act of 1849 (§ 178) is also framed so as to exclude indefinite claims by authorizing the Court to expunge a claim not matured into a proof within six months. If the appellant is right, a claim in respect of a contingent unliquidated liability would be retained, when one for a contingent liquidated liability might not. The Lord Chief Baron said in one case, that less mischief would arise from repealing than from extending provisions of this kind. The section in the present Act contains no such machinery or safeguard. The result of construing it as the appellant contends would be that the trustees

* 334 or assignees would hasten to * make a distribution for the purpose of shutting out possible unliquidated claims, so

(a) *De Gex*, 100.

that the possible claimant would be the first and most frequent sufferer: for, his demand being provable, it would be barred by the order of discharge, and yet he would get no part of the assets; for the effect of the order of discharge does not and could not be made to depend on the existence of assets at the time when the damage actually occurred. No contractor can be said to be "liable" within the meaning of the section until a breach of the contract; and this reasonable interpretation is supported by a consideration of the object of the bankruptcy and of a trust-deed, viz., a present distribution of the balance of the debtor's assets amongst existing creditors. Whereas, if the construction submitted on behalf of the appellant is correct, no distribution could take place for an indefinite period. On the second point, we submit that the commissioner is also right in the view which he has taken of the date to be attributed to the supposed adjudication of bankruptcy. The language of the statutory form of deed settles this. It is "as if he had been adjudicated bankrupt at the date hereof," nor is this at all inconsistent with any other part of the Act. It would be impossible to make the affidavit required by the 5th condition specified in the 192d section prospectively and with a reference to what might be the state of circumstances at the time of the registration of the deed, or consequently to know what *ad valorem* stamp the deed must, under the 4th condition previously to being produced and left for registration at the office of the chief registrar, have been impressed with or have had affixed to it.

[THE LORD CHANCELLOR. — Resort has not apparently in the present case been had to the statutory form of deed, by reason of the existence of the circumstances under which the 200th section requires that form to be used.]

That does not appear. But as the form is given in the * schedule to the Act, it must be assumed not to be contrary * 335 to the provisions of the Act itself, and its language is distinct and unequivocal.

Mr. Daniel, in reply.

Judgment reserved.

February 10.

The Lord Chancellor (after stating the nature of the case and the alteration of the law made by the section) proceeded as follows:—

The learned commissioner appears to have thought that the construction which he has put upon the section was not according to the intention of the framers of it. I do not agree in that opinion. But I agree in thinking that, according to the true construction of the Act, and, I think that, according to the intention of its framers, demands of this nature should be limited to cases in which the cause of action is complete at the time of the adjudication, and that consequently the 153d section only applies to such demands in the nature of damages as are capable of being enforced against the bankrupt at the date of the adjudication.

In this case there has been no bankruptcy but a trust-deed in the form given by one of the schedules to the Act, and I think that the date of the deed is by the Act rendered equivalent to that of an adjudication of bankruptcy. The question therefore is, whether the debtor in this case was at the date of the deed liable by reason of any contract or promise to a demand in the nature of damages. Now the contract might be performed at any time during the month of January. The date of the deed was the 30th of

January, so that at the date of the deed there was an interval of time during which the * debtor might have delivered the oil. I am unable to say that the debtor was, at the date of the deed, liable by reason of any contract or promise to a demand in the nature of damages. And I agree with the argument which has been addressed to me, that it would not be desirable, if it were possible, by construction to extend this interpretation of the statute; for then it would be very difficult to define the limit to which it might be extended, and great confusion would be introduced into the administration of the law of bankruptcy by the admission of new demands arising at indefinite periods subsequent to the adjudication. It was argued ingeniously enough by Mr. Daniel, in opposition to the argument as to the date of the deed being equivalent to that of the adjudication, that inasmuch as, if the appellant had filed a petition for adjudication subsequent to the date of the trust-deed, but before the expiration of the time for its registration under the 192d section, his petition would, by the operation of the

199th section, when the deed was so registered, have been dismissed, it must be inferred that a creditor who was thus deprived of his remedy must have been intended to be admitted under the trust-deed. But I think that no such consequence follows. The 199th section no doubt protects the trust-deed from being upset by an adjudication between its date and its registration. But the remedies of creditors are left in other respects untouched, and the remedy of the present appellant will remain, subject to this observation, that by reason of this enactment he is unable to interfere with the validity of the trust-deed. I think, therefore, that no such inference can be drawn from the 199th section as would warrant any other construction of the 153d section than that which the commissioner has put upon it, and of which I entirely approve. I affirm the commissioner's order and dismiss the appeal with costs.

* WARNER v. SMITH.

* 337

1863. February 24. Before the LORDS JUSTICES.

The two defendants, who carried on business in partnership as ship and insurance brokers, and the plaintiff who carried on business alone as a merchant and commission agent, jointly agreed to supply arms to a foreign government. In the first contract with that government, the defendants were described only by their partnership name, and it was signed on their behalf in that name. The second contract was signed by an agent of the plaintiff and defendants, who was described in it as acting on behalf of the defendants (giving only the name of the firm) and the plaintiff, and as "agent of the two houses above named." *Held*, reversing the decision of the Court below, that on the form of these contracts in the absence of evidence to the contrary, the adventure must be considered to have been undertaken by the defendants as one person and the plaintiff as another person, and not by the three as individuals, and that the plaintiff was entitled to a moiety of the profits.

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor STUART, declaring that the plaintiff was entitled to one-third of the profits of a joint adventure, and ordering him to pay the costs of the suit.

The plaintiff carried on the business of a merchant and commission agent in London. The defendants, J. H. Smith and F. Greg-

ory, carried on business as ship and insurance brokers in London, under the firm of "Messrs. Smith & Gregory."

In 1859 an application was made to the defendants to make a tender for 20,000 stand of arms, to be supplied for the Piedmontese army. The defendants applied to the plaintiff, and it was arranged that the plaintiff and defendants should undertake the contract, and share the profit and loss.

On the 6th of December, 1859, the plaintiff and defendants accordingly entered into a contract with Messrs. Delarue & Co., bankers, of Genoa, to supply the arms for 58,000*l*. This contract was drawn up and signed at Paris, in the French language; M. Camille Heurtier signed it on behalf of Delarue & Co., and M.

Achille Ambroise on behalf of the plaintiff and defendants.

* 338 The * following is a translation of the parts material for the present purpose:—

"Between the undersigned, — 1. Messrs. Smith & Gregory, merchants, residing at No. 17 Gracechurch Street, London, and Arthur Warner, merchant, residing and domiciled at No. 31 Threadneedle Street, London, of the one part; 2. M. Achille Ambroise, merchant, domiciled in Paris, 12 Rue de Ménars, acting as agent and correspondent of the above, of the other part; 3. and M. Camille Heurtier, merchant, residing and domiciled in Paris, 44 Rue de Marais, St. Martin, empowered and acting in the name and as the special delegate of Messrs. Delarue & Co., bankers, residing and domiciled at Genoa, Italy, under a power of attorney delivered, &c., also of the other part, It has been agreed and determined as follows: 1st article. Messrs. Smith & Gregory, Arthur Warner, and Ambroise undertake to furnish and deliver to Messrs. Delarue & Co.," &c. . . .

Throughout the contract the stipulations were expressed as between Delarue & Co. and "Messrs. Smith & Gregory, Arthur Warner and Ambroise." And the signatures were "Smith & Gregory," "Arthur Warner," "Achille Ambroise," "Camille Heurtier (special mandatary of Delarue & Co.)."

Ambroise had no interest in the contract, except that he was to share a commission to which Heurtier was entitled.

On the 21st of March, 1860, another contract for a further supply of arms was entered into as follows:—

"Between the undersigned — 1st. Achille Ambroise, merchant, living in Paris, Rue Ménars, acting in the name and on behalf of Messrs. Smith & Gregory, merchants, * living in * 339 London, 17 Gracechurch Street, and Arthur Warner, merchant, living in London, 31 Threadneedle Street; 2d. In the name as agent and correspondent of the two houses above named, and acting for them, of the one part, and M. Baptiste Malatesta, advocate, living actually in Paris, 23 Rue de Laval, acting in the name and on behalf of the Tuscan government, of the other part, It has been stipulated and agreed as follows: Messrs. Smith & Gregory, Arthur Warner, and Achille Ambroise engage to get manufactured and to deliver to the Tuscan government 1000 rifled carbines, &c., in every particular similar to the 2000 rifled carbines, &c., which are mentioned in the contract of 6th of December last, entered into between the three first-named parties and M. Camille Heurtier, furnished with powers from Messrs. Delarue & Co., bankers, at Genoa."

After various stipulations as to delivery and payment, the contract concluded as follows:—

"Furthermore the parties declare themselves willing to observe all the clauses contained in the contract of the 6th of December last, and in the letters which have modified it. (Signed) ACH. AMBROISE, BAPTISTE MALATESTA."

The plaintiff and defendants employed sub-contractors to supply the arms. Many of the offers to take sub-contracts were made by letters addressed to "Smith, Gregory, & Warner," but the acceptance nearly always was in the form "Smith & Gregory — Arthur Warner." The plaintiff on three or four occasions signed letters on behalf of the three,—"Arthur Warner for Smith, Gregory, & Warner," or "for Smith, Gregory & Warner—Arthur Warner;" but usually the signatures were in * the form, * 340 "Smith & Gregory — Arthur Warner." On one occasion a document was signed by the defendant J. H. Smith as follows: "Smith & Gregory — J. Harrison Smith for Arthur Warner." The invoices were sometimes made out by the sub-contractors to "Smith, Gregory, & Warner," but most of them to "Smith & Gregory"

only. Mr. Gregory took hardly any active part in the transaction, but Mr. Smith acted on his behalf.

There was no direct evidence showing in what shares the profits were to be divided, and the question turned upon the inferences to be drawn from the above documents. The Vice-Chancellor held that the fact of two of the three persons being partners did not affect the question, and that the case was governed by the ordinary rule that the persons forming a partnership are, in the absence of evidence to the contrary, to be treated as equally interested. His Honor accordingly declared the plaintiff entitled to one-third of the profits. The plaintiff appealed.

Mr. Druce, for the appellant. — The contracts show that they were entered into by the firm of Warner and the firm of Smith & Gregory, and the first inference, in the absence of Special stipulation, is, that the firms, not the individuals, were to be interested in equal shares. The first contract describes the defendants collectively as Smith & Gregory, and the collective signature Smith & Gregory is used; thus treating them as, for the purpose of the contract, forming one person. The second contract is decisive, for it speaks of the two houses of Smith & Gregory and Arthur Warner. The contracts with the sub-contractors support our contention. The Vice-Chancellor decided the case on the * 341 authority of *Peacock v. Peacock*; (a) * but to make that case support the defendants' argument it must first be made out that the contracting parties were three individuals; whereas, if our contention be right that the contracting parties were the two firms, the case is in our favour.

Mr. Greene and *Mr. Roberts*, for the defendants. — The contracts with the sub-contractors cannot be relied on; they were not intended to settle any rights between these parties. Nor can the contracts with the foreign governments have any further effect, the same remark applying to them. As to the second contract, moreover, this further observation applies, that Ambrose, who was the only party concerned in its drawing up, had no authority to determine the rights of the contractors *inter se*. A firm is not a corporation; and how can a joint undertaking by three persons

(a) 16 Ves. 49.

be considered, in the absence of special stipulation, to have been undertaken by them otherwise than as three individuals? This was an undertaking entirely out of the scope of the partnership business of the defendants, and they cannot be considered to have entered upon it as a firm. Suppose two brothers, John and Thomas Smith, had been concerned in the transaction; would calling them in the contracts "Messrs. John and Thomas Smith" make them one person for the purposes of the contract? There is no analogy between this and the case where a conveyance is made to a husband and wife and a third person, for in that case there is a legal unity of persons, which does not exist here. The *onus* of showing that there was to be a division otherwise than in thirds rests on the plaintiff, and he has not discharged himself of it. The invoices are against him.

Mr. Druce, in reply. — The dealing between the plaintiff and the defendants * went on the footing of a dealing be- * 342 tween two firms. The first proposal to the defendants from abroad was to them as a firm. They say to the plaintiff, "Will you join us?" The plaintiff could only understand them to be acting as a firm, and if they seek to place matters on the footing that the plaintiff dealt with them as two individuals, they must prove that he did.

THE LORD JUSTICE KNIGHT BRUCE. — The question in this case depends upon the construction of two instruments, the originals of which are in the French language, and upon the weight and effect of the other evidence. The defendants, Messrs. Smith & Gregory, carried on business as ship-brokers and insurance brokers in London under the firm of Smith & Gregory; the plaintiff Mr. Warner carried on business as a merchant in London in his own name and on his own account. In the years 1859 and 1860 the plaintiff and the defendants entered into certain contracts for a supply of arms to the Italian government at certain prices. The parties acted under these contracts, and a profit was derived from them. The sole question in the case is, whether the profits are to be divided into *moieties* or into thirds; whether, in fact, Messrs. Smith & Gregory were to be regarded for the purposes of this adventure as two persons or as one. If the French contracts, which were the inception of the matter, are looked to, either in

the original or in the translation, the just inference from them appears to be that Messrs. Smith & Gregory engaged in them as a firm,—that is to say, in effect, as one person. The inference then from these contracts, if taken alone, is that the profits ought to be divided in moieties. But there is other evidence, and of that evidence it is fairly arguable that some parts lead to the conclusion for which the defendants contend; other parts, it is also fairly arguable, lead to the conclusion for which the plaintiff contends. But there seems nothing of any weight beside the French contracts. The rest of the evidence, in my judgment, leaves the case where they leave it; and the just inference from them, in my opinion, is that Messrs. Smith & Gregory engaged in them as one person and Mr. Warner as another. I think the plaintiff right in his contention, that he is entitled to a moiety of the profits, and that the decree should be altered accordingly; but there are circumstances in the case which make it, in my judgment, right to say that no costs should be given on either side.

THE LORD JUSTICE TURNER. — This, no doubt, is a case in which different minds may come to different conclusions, and I have been unable to arrive at the same conclusion at which the Vice-Chancellor has arrived. The question before us may, I think, be fairly tested by considering how matters would have stood if Messrs. Smith & Gregory had become bankrupt, would the share of profits coming to them have been joint estate, or would one half of it have been the separate estate of each. The first contract is between Smith & Gregory, described as merchants, the plaintiff described as a merchant, and Ambroise described as merchant and agent. It was signed with the partnership name of Smith & Gregory, and was signed separately on behalf of the plaintiff. Thus the signature on the part of the defendants was *prima facie* an act done in their partnership character. What then follows? A second contract is made, into which Ambroise enters on behalf of “Messrs. Smith & Gregory” and “Arthur Warner,” and as agent “of the two houses above-named.” The sub-contracts are generally accepted by “Smith & Gregory” and “Arthur Warner.” Under these circumstances, I am of opinion that if the case had arisen in bankruptcy the share of the profits coming to Smith & Gregory would have been joint estate.

It is urged that this was not a transaction within the scope of

the partnership between Smith & Gregory, and that they could not enter into it as a firm. It is true that Smith might not, by entering into such a contract on behalf of the firm, be able to bind Gregory as a partner, but Gregory could elect to be bound, and it is plain that he did elect to affirm the contract; and if upon its true construction it was a contract made on behalf of the firm, its effect cannot be varied by the circumstance that Gregory might, if he had pleased, have refused to be bound by it.

It was argued for the defendants, that according to *Peacock v. Peacock* the *onus* of proof would be upon the party seeking to show that the three were not to be equally interested,¹ but that argument assumes the whole question in dispute. The *onus* of proof must shift according to the circumstances of the case, and if two of the three parties negotiated in such a way as to make the arrangement one between two contracting parties, instead of three, I think that the *onus* of proof was shifted.

The point which struck me as making most strongly in favour of the defendants was, that on several occasions the plaintiff signed letters for "Smith, Gregory, and Warner." He might, however, naturally use this form of introducing the names of all the individuals interested in the adventure, and I do not think that the fact of his having done so furnishes any inference sufficiently strong to counteract the effect of the contracts * which deal * 345 with Smith & Gregory as partners. I am of opinion, therefore, that the decree of the Vice-Chancellor must be altered so as to give the plaintiff a moiety of the profits, but I think that there should be no costs.

¹ See *Copland v. Toulmin*, 7 Cl. & Fin. (Am. ed.) 350, and cases in note (1); *Stewart v. Forbes*, 1 Mac. & G. 197, and cases in note (2); *Collyer Partn.* (5th Am. ed.) § 167, note; 1 *Lindley Partn.* (3d Eng. ed.) 696, 697, 699.

BLAKE v. PETERS.

1863. March 3. Before the LORDS JUSTICES.

Real estate was devised to a person in fee with a gift over in the event of his dying without leaving issue living at his death, and it was declared that he should not cut timber except for necessary repairs on pain of forfeiting his estate, and that if he did so the estate should go over. The devisee died without issue, having cut and sold timber. *Held*, that this restriction was legal, that the clause of forfeiture was only an additional means of securing its observance, and that the value of the timber could be claimed against the estate of the devisee.

The will directed the devisee during his life to keep certain renewable leaseholds fully estated with three lives, which leaseholds were subject to the same limitations as the real estate. *Held*, that the whole expense of renewals during the life of the first devisee was to be borne by him.

THIS was an appeal by the executors of John Weston Peters from a decree of Vice-Chancellor KINDERSLEY, in a suit instituted to make the estate of J. W. Peters liable for waste committed by him, and for the omission to renew certain leases.

John Eason, by will, dated the 17th of June, 1816, made the following disposition : —

“ I give, devise, and bequeathe unto my sister, Elizabeth Eason, all my estate and interest in my messuages, tenements, lands, tithes, and hereditaments, both freehold, copyhold, and leasehold ; and also, all my moneys, goods, chattels and personal estate, to be at her absolute disposal ; subject, nevertheless, to the conditional disposition thereof hereinafter contained, and subject, as to the personal estate, to the aforesaid legacies and annuities. Provided always, that in case my said sister should happen to die without
 * 346 having made any disposition * by deed, will, or otherwise, of my said messuages, &c., then it is my will, after her decease, and I give and devise the same, or such part or parts thereof as shall not be disposed of by my sister as aforesaid, in manner following (that is to say) : ”

The testator then gave Bridge Farm and other lands to John Weston Peters, his heirs, executors, and administrators ; but in case he should happen to die without leaving any male issue at

the time of his decease, or if he should not occupy Bridge Farm, then from and after his decease without leaving any issue, or his not occupying Bridge Farm, to John Louch, his heirs, executors, and administrators; but if J. Louch should die without leaving any male issue, then to Samuel Sparks, his heirs, executors, and administrators. Then there was a similar disposition of other lands, at Curry Rivell, to J. Louch, and in the event of his dying without leaving male issue, then to J. W. Peters, and in the event of his dying without leaving male issue, then to S. Sparks. "Provided also, and it is my will, that the two several persons to whom I have hereinbefore given my estates, prior to the contingent devise to the said S. Sparks, shall not cut down or fell any timber trees on any of my estates (except for necessary repairs) on pain of forfeiting all their respective estates and interests in the premises."

The testator died in June, 1816. Elizabeth Eason took possession of the property given her by his will. By her will dated the 16th of October, 1828, she disposed of the Curry Rivell lands in a mode which need not be specified. The testatrix also declared, that in no event should the devise in remainder to John Louch, his heirs, executors, or administrators, or his issue male, contained in her brother's will of the Bridge Farm, &c., take effect; but that in case J. W. Peters should * happen to die with- * 347 out leaving any male issue living at the time of his decease, or if he should not occupy Bridge Farm, &c., or should cut down or fell, or cause to be cut down or felled, any timber of the premises conditionally devised to him by her brother's will, or should plough, break up, or convert into tillage, or cause or permit to be ploughed, &c., any part of the orchard, meadow, or pasture thereof, then the lands comprised in that devise should, immediately on the happening of either of the said contingencies, pass to the person or persons who would become entitled thereto by virtue of the ultimate limitation thereof contained in her brother's will. Then, after some provisions about fencing parts of the property, followed this clause: "Provided also, and it is my will, that the person or persons who shall be in the possession or enjoyment of any of my late brother's estates, or lands, or any part thereof, shall not cut down, or fell, or cause or permit to be cut down or felled, any timber thereon or any part thereof (except for the necessary

repairs of the said premises respectively), on pain of forfeiting all their respective estates and interests in the premises."

The testatrix made eight codicils to her will, and altered the disposition of the Bridge Farm, as regarded the persons who were to take it in the event of its going over from J. W. Peters, but did not alter his interest in any way material to be noticed.

Part of the estate of the testatrix consisted of renewable leaseholds and copyholds held for lives. In her codicils was contained this direction: "Provided also, and it is my will, that the said J. W. Peters shall from time to time during his life keep my leasehold and copyhold estates at Barrington, Longload and

* 348 Dinnington aforesaid, fully estated with three lives, * which shall be subject to all the limitations before by me expressed and declared concerning the same." These limitations were the same as those of the Bridge Farm.

The testatrix died on the 13th of July, 1830, and J. W. Peters thereupon entered into possession of the Bridge Farm, and other property subject to the same limitations. He died on the 27th of July, 1858, without leaving any issue male, and the Bridge Farm and other property devolved upon the plaintiffs under the gift over.

J. W. Peters, during his occupation, allowed some of the buildings on the property to fall down for want of repair, cut timber (not for necessary repairs), and omitted to keep up the lives on which the freeholds and copyholds were holden. The present bill was filed for the purpose of making his estate liable for the loss thus occasioned.

The Vice-Chancellor held, that J. W. Peters was under no obligation to repair the buildings, but that his estate was liable for the value of all materials which he had carried away from them and employed for his own use; that the restraint imposed upon his cutting timber was valid, and that his estate was liable for the value of the timber cut. And, lastly, that he was bound to renew the leaseholds and copyholds at his own expense, and that his estate was liable for all loss occasioned by his not having done so. His Honor upon this point made a declaration, "that the estate of the said J. W. Peters is liable to make good for the benefit of the plaintiffs, and such other person or persons (if any) as may become or otherwise might have become entitled to such

leasehold and copyhold estates, the amount of the loss or diminution in the value of the leasehold and * copyhold * 349 estates at Barrington, &c., at the death of the said J. W. Peters, occasioned by his having omitted to keep the same leasehold and copyhold estates or any of them fully estated for three lives, with interest at the rate of 4*l.* per cent per annum on the amount of such loss or diminution in value for the death of the said J. W. Peters."

The defendants, the executors of J. W. Peters, appealed against the whole decree.

Mr. Glasse and *Mr. Sandys*, for the plaintiff, in support of the decree. — The first question is, whether a devisee in fee, subject to an executory devise over, can legally be restrained from cutting timber. There is no authority directly in point, but so far as the cases touch the question, they support the position that he can. In *Turner v. Wright*, (a) it was held, that a devise in fee, subject to an executory devise over, was at liberty to commit legal waste, but an injunction was granted to restrain him from committing equitable waste. This shows, that a person in that position is subject to restrictions, which could not even by express words be imposed upon an absolute devisee in fee. Lord HARDWICKE, in *Robinson v. Litton*, (b) had decided that a tenant in fee, subject to an executory devise, might be restrained from waste, and this is approved in *Stanfield v. Habergham*. (c) The Vice-Chancellor, in *Turner v. Wright*, expressed a clear opinion, that a clause prohibiting legal waste would have been effectual, and *Lady Langdale v. Briggs*, (d) supports this view. Where a tenant for life has committed waste, the right against his assets is clear; and the assets here * are liable on precisely the same ground, — * 350 that they have been increased by the unlawful act. *Kingham v. Lee*, (e) *Re Skingley*, (g) *Wright v. Wilkin*, (h) *Duke of Leeds v. Lord Amherst*, (i) *Lansdowne v. Lansdowne*, (k).

(a) Johns. 740; 2 De G., F. & J. 234.

(e) 15 Sim. 396, 400.

(b) 3 Atk. 209.

(g) 3 Mac. & G. 221.

(c) 10 Ves. 273.

(h) 2 B. & S. 232, 259.

(d) 8 De G., M. & G. 394.

(i) 14 Sim. 367; 2 Phill. 117; 20 Beav. 239.

(k) 1 Mad. 116; 1 Jac. & W. 522.

[The Lord Justice KNIGHT BRUCE referred to *Wright v. Atkyns*. (a)]

Then as to the leaseholds, the Vice-Chancellor relied on *Colegrave v. Manby* (b) and *Bennett v. Calley*. (c) There are two other cases which support his decision, *Gregg v. Coates*, (d) and *Warren v. Rudall*. (e)

Mr. Martindale, for the tenants in tail in remainder. — In *Wright v. Atkyns*, (a) no condition was imposed on the devisee; the question only was what degree of restriction was imposed upon her by the limited nature of her estate. Here there is an express prohibition of cutting timber. The *onus* lies on the appellants to prove that such an express restriction is void in law.

Mr. Baily and *Mr. Karlake*, for the appellants. — We contend that such a restriction on cutting timber as that sought to be imposed by this will is void for repugnancy, for it reduces the estate to a life-estate. It is settled by *Turner v. Wright* that a tenant in fee, subject to an executory devise, may cut timber in the ordinary course, and the opinion of the Vice-Chancellor seems to have been opposed to the view that the testator could * 351 restrain him from so doing. In this will, moreover, * the remedy was intended to be forfeiture, and forfeiture only. During the lifetime of the first devisee the Court would not have interfered, but would have left the party complaining to recover the estate at law. Now the Court will not give a remedy against the assets of a deceased person for an act which it would not have interfered to prevent his doing in his lifetime. Therefore, even if the restriction is good, the Court will not give the relief now sought.

As regards the leaseholds, we say that the decree is erroneous in two respects. First, because it makes no provisions as to leaseholds which could not have been renewed; and secondly, because it contains no provisions for compensation in respect of fines paid for renewals of which the estate is still receiving the benefit. The

(a) 1 V. & B. 313; 1 T. & R. 143.

(d) 23 Beav. 33.

(b) 6 Madd. 72; 2 Russ. 238.

(e) 1 Johns. & H. 1.

(c) 5 Sim. 181; 2 M. & K. 225.

Vice-Chancellor came to the conclusion that one testator was bound to pay the fines for renewal out of his own pocket, but we submit that this is not the true construction of the will. *Richardson v. Moore*, (a) *Re Money's Trust*, (b) *Hudlestone v. Whelpdale*. (c)

Mr. Glasse, in reply. — In *Solley v. Wood*, (d) it was held that the person in possession must pay the renewal fines out of the rents received by him, and the words there were not stronger than those in the present case.

THE LORD JUSTICE KNIGHT BRUCE. — I think with the Vice-Chancellor that forfeiture is not the only remedy in this case, and that there is an expression * of intention that * 352 timber should not be cut, — an expression of intention which, as I conceive, made Mr. John Weston Peters liable in equity as if he had been a tenant for life impeachable of waste. I agree, therefore, with the Vice-Chancellor, that his estate is liable to refund the amount of the profits which he derived from cutting timber. As regards the renewals, my view of the construction of the will is, that it was the intention to throw the burden of them wholly upon Mr. John Weston Peters, and that his estate is not entitled to any compensation in respect of them.

THE LORD JUSTICE TURNER. — As my learned brother's opinion agrees with that of the Vice-Chancellor, it is of no importance whether I concur in the opinion or not, but it may be right for me to say that I fully concur in it so far as relates to the timber. I do not think that the restraint upon cutting timber during the life of the first devisee was invalid, and I think that the words "on pain of forfeiture" are inserted only as a more effectual means of enforcing the obligation, and cannot be held to take away the rights and remedies which arise from the prohibition itself. As to the other point, I am not so fully satisfied, but I incline to take the same view of this point also as the Vice-Chancellor has taken, though I desire to be understood as not giving any concluded opinion upon it.

(a) 27 Beav. 629.

(c) 9 Hare, 775.

(b) 2 Drew. & Sm. 94.

(d) 29 Beav. 482.

The declaration as to the omission to renew was varied, and as varied was as follows : —

Declare that the estate of J. W. Peters is liable to make
 * 353 good for the benefit of the plaintiffs and such other * person
 or persons (if any) as may become or otherwise might have
 become entitled to the leasehold and copyhold estates comprised
 in the said wills and codicils the amount of the loss or diminution
 in the value of the leasehold and copyhold estates at in the
 pleadings mentioned at the death of the said J. W. Peters occa-
 sioned by his having omitted to keep fully estated for three lives
 such of the same leasehold and copyhold estates as could have
 been kept so fully estated, together with interest at the rate of 4l.
 per centum per annum on the amount of such loss or diminution
 in value from the death of the said J. W. Peters.

YOUNG v. FERNIE.

1863. December 21. Before the Lord Chancellor Lord WESTBURY.

In order to bring a case within the proviso contained in the 25th & 26th Vict. c. 42, § 2, authorizing the Court of Chancery, notwithstanding the Act, whenever it shall appear that a question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues in the Superior Courts of Common Law, to direct such trial, the Court of Chancery must be satisfied that the administration of justice in the particular case may be more conveniently exercised and promoted by directing such issues, than by completing the hearing and the inquiry before itself.¹

THIS was an appeal from an order made by Vice-Chancellor STUART in a suit to restrain the infringement of a patent, directing the trial of certain issues before the Court of Common Pleas. The ground of the decision was, that the 2d section of the 25 & 26 Vict. c. 42, which provides, that whenever it shall appear to the

¹ See *Fernie v. Young*, L. R. 1 H. L. 63; 12 Jur. N. S. 437; *Johnson v. Wyatt*, 2 De G., J. & S. 18; 1 Dan. Ch. Pr. (4th Am. ed.) 876; 2 ib. 1071, and cases in note (1); *Bovill v. Hitchcock*, L. R. 3 Ch. Ap. 417.

Court that any question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues in the Superior Courts of Common Law, it shall be lawful for the * Court of Chancery to direct such * 354 trial, notwithstanding the other provisions of the Act, applied not only to cases in which the Court considered the question of convenience with reference to the parties to the particular suit, but also to cases in which the question of convenience was regarded with reference to the state of the business of the Court and the interests of the suitors of the Court in other causes.

Sir Hugh Cairns, Mr. Karlake, and Mr. W. N. Lawson, for the plaintiffs, the appellants, argued that the word "conveniently" in the Act had reference to the interests of the suitors in the particular case in which the application was made, and not to the interests of the general body of the suitors of the Court. That the only case in which the issues ought to be tried at law was where the witnesses lived in the country, and it would cause great additional expense to bring them to London, or where it was necessary that the jury should have a view, or the like.

Sir Fitzroy Kelly and Mr. W. W. Mackeson, for the defendants, contended that the balance of convenience was in favour of the trial in a Court of Law, but mainly relied upon an alleged acquiescence in the decree of the Vice-Chancellor on the part of the plaintiffs, which, however, in the opinion of the Lord Chancellor, was not established.

A reply was not heard.

THE LORD CHANCELLOR. — This application is one of considerable importance.

I construe the statute as laying down the rule for the * future that these things shall be heard and determined in * 355 this Court. The proviso operates by way of exception only to the rule; and, in order to bring a case within the proviso, the Court must be satisfied that the administration of justice in the particular suit may be more conveniently exercised and promoted by directing issues to be tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues in the Common Law Courts, than by completing the hearing and the inquiry before

itself. In a patent case particularly, and in this case, having regard to the nature of the questions raised, I do not think that any thing more inconvenient can be suggested than that, where there are mixed questions of law and fact, the one bound up with the other and scarcely capable of being separated, an attempt should be made to cut the cause in halves and to send one-half of it to be tried by a jury in a Court of Common Law, reserving the other half for determination in this Court. It is impossible that any satisfactory conclusion can be arrived at by that mode of dividing an investigation, which should be one and entire. Such a division often renders necessary a great number of proceedings, a great number of shiftings to and fro, and very frequently much expense arising from misapprehensions, which might have been avoided had the Court where the matter originated — the Court of Chancery — kept the whole proceedings in its own hands. It is but a few days ago that I had to determine a patent cause, (a) which had been sent to law upon issues which had been tried with great waste of time and money, and the cause was ultimately decided, rightly or wrongly — I think rightly — upon a short question of law, which was *in limine*, a question arising immediately upon the terms of the specification. Nothing to my mind, * 356 is more to * be deprecated than to divide a patent case, and to send issues of this nature for trial by a jury at common law.

If that be so, the present being a cause in which it is quite clear that there will be mingled inquiries both of law and fact, which ought to be at once conducted and heard before and by the same tribunal, I think the convenience of justice and the convenience of parties on both sides will be best promoted by my annulling this order and (unless the parties agree that the case should be heard by myself) directing the cause to be restored to the paper of the Vice-Chancellor, to be heard in the ordinary way.

(a) *Spencer v. Jack*, 25 November, 1863.

In the Matter of JOHN WRAGG, a Person of Unsound Mind,
not found so by Inquisition ;

In the Matter of The Estate of WILLIAM EATON MOUSLEY,
late of, &c., deceased ;

GREGORY v. MOUSLEY (by Summons) ;

GREGORY v. MOUSLEY (by Claim) ;

And in the Matter of The TRUSTEE ACT, 1850.

1868. April 24. Before the LORDS JUSTICES.

Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for sale of his real estate has been entered into and the purchase-money paid into Court, are persons "beneficially interested" in the lands comprised in the contract within the scope of the Trustee Act, 1850, § 37, and entitled to apply thereunder.

THIS was a petition by the plaintiffs in two creditors' suits, wherein an administration decree had been made and sales of portions of a testator's real estate had been directed. The prayer was for a vesting order in respect of lands comprised in one of the contracts for sale under the decree. The purchaser had paid his * purchase-money into Court in the suits. The * 357 legal estate in the lands in question was vested in John Wragg, a person of unsound mind, not found so by inquisition.

Mr. Baggallay and *Mr. Rowcliffe* submitted that the petitioners were persons "beneficially interested" in the lands in question within the meaning of the Trustee Act, 1850, § 37, and were entitled to make the present application.

Mr. Liebstein, for the purchaser, consented.

Mr. Hobhouse and *Mr. Bardwell*, for other parties.

THE LORD JUSTICE KNIGHT BRUCE. — It will, I think, be a bene-

ficial construction of the Act to hold the petitioners to be within the scope of its 37th section.

THE LORD JUSTICE TURNER. — I will not differ.

The vesting order was made accordingly.

Reg. Lib. 1863, B. fol. 1167.

* 358 * In the Matter of the Estate of THOMAS BYRON,
deceased;

And in the Matter of The COMPANY OF PROPRIETORS OF
THE REGENT'S CANAL;

And in the Matter of The CATERHAM RAILWAY COMPANY,

In the Matter of The CATERHAM RAILWAY ACT, 1854,

And in the Matter of The CATERHAM AND SOUTH EAST-
ERN RAILWAY COMPANIES' ACT, 1859.

1863. June 5. Before the LORDS JUSTICES.

The rule laid down in *Ex parte* the Bishop of London (2 De G., F. & J. 14), that the costs of the reinvestment of moneys paid into Court by several companies for lands taken by them under the Lands Clauses Act ought to be borne by the companies in equal shares, except the costs of the *ad valorem* stamp on the conveyance, is to be followed in the absence of peculiar circumstances of hardship.¹

THIS was an appeal by the South Eastern Railway Company against so much of an order made by the Vice-Chancellor STUART, upon the petition of the tenant for life of an estate and encumbrancers upon it, as directed the payment, pursuant to the provisions of the Lands Clauses Consolidation Act, by the appellants and the Regent's Canal Company of the costs, charges and ex-

¹ See *Ex parte* Corporation of London, L. R. 5 Eq. 418.

penses of the petitioners of the reinvestment in land of a sum of 1484*l.*, part of a larger aggregate sum representing the purchase-moneys of parts of the estate, and of obtaining the order for reinvestment and all proceedings relating thereto, ratably and in proportion to the respective amounts to be produced by the sales (directed by the order) of a certain sum of 1207*l.* 15*s.* 3*d.* reduced annuities, and of a competent part of a sum of 1136*l.* 4*s.* 4*d.* bank 3*l.* per cent annuities, and as directed the taxing master to apportion such costs accordingly. The result of the taxation * under the latter direction had been the appor- * 359
tionment of a sum of 147*l.* 13*s.* 10*d.* to be paid by the appellants, and of a sum of 44*l.* 0*s.* 10*d.* to be paid by the Regent's Canal Company.

The 1207*l.* 15*s.* 3*d.* reduced annuities, mentioned in the order, represented purchase-money for part of the estate paid into Court about the year 1855 by the Caterham Railway Company, which had become merged before the presentation of the petition in the South Eastern Railway Company.

The 1136*l.* 4*s.* 4*d.* bank 3*l.* per cent annuities, also mentioned in the order, represented the residue of purchase-money for other part of the estate paid into Court about the year 1854 by the Regent's Canal Company, after payment thereout, in the year 1856, to the tenant for life in pursuance of an order of the Court, of a sum of 805*l.* sterling, in discharge, as the present petition stated, of a fine paid by him as in a former petition mentioned.

Mr. Malins and *Mr. J. T. Humphry*, for the appellants. — The case of *Ex parte The Bishop of London* (a) has settled the practice in these cases; and in accordance with that case the burden of costs in the present case should have been distributed equally between the appellants and the canal company, except as regards the costs of the *ad valorem* stamp upon the conveyance; and those costs should be borne by them ratably, according to the amounts which they contributed respectively to the purchase-money. The rule laid down by this Court in the case cited was followed by the Master * of the Rolls in the case of *In re Maryport* * 360
and *Carlisle Railway Act*, 1855. (b)

Mr. Schomberg, for the petitioners in the Court below.

(a) 2 De G., F. & J. 14.

(b) 32 L. J. N. S. Ch. 811.

Mr. Wickens, for the Regent's Canal Company. — The facts of the present case show on the part of the petitioners, in their mode of dealing with the various funds in Court representing portions of the estate, the exercise of a mere caprice, whereby they have, by taking the whole of the purchase-money paid in by the appellants, at a later period, it should be observed, than that paid in by the canal company — discharged the appellants from all further liability on the score of costs of reinvestment, and have left in Court part of the fund paid in by the canal company, notwithstanding their having borne the expenses of the payment, in 1856, to the tenant for life in respect of the fine paid by him. This is a hardship sufficient to take the present case out of the rule, if any, established by *Ex parte The Bishop of London*, and I submit that the order of the Vice-Chancellor should be upheld.

THE LORD JUSTICE TURNER. — In my judgment the rule laid down in *Ex parte The Bishop of London* is a beneficial rule, and one upon the whole just and not to be lightly disturbed, especially as it has been adopted since it was originally laid down.

There is not here any circumstance of extreme hardship to render consideration necessary whether or not the rule should
* 361 in the present case be held inapplicable. * The order should therefore, I think, be varied accordingly.

THE LORD JUSTICE KNIGHT BRUCE. — I concur.

See next case.

In the Matter of The WARDEN AND SCHOLARS OF THE HOUSE OR COLLEGE OF SCHOLARS OF MERTON; IN THE UNIVERSITY OF OXFORD;

And in the Matter of The EAST KENT RAILWAY ACT, 1853;

And in the Matter of The LONDON, CHATHAM, AND DOVER RAILWAY ACT, 1859;

And in the Matter of The MIDLAND RAILWAY (LEICESTER AND HITCHIN) ACT, 1853;

And in the Matter of The WYCOMBE RAILWAY ACTS, 1846; THE WYCOMBE RAILWAY AMENDMENT ACT, 1852; and The WYCOMBE RAILWAY EXTENSION ACT, 1857;

And in the Matter of The BEDFORD AND CAMBRIDGE RAILWAY ACT, 1860;

And in the Matter of the LANDS CLAUSES CONSOLIDATION ACT, 1845;

And in the Matter of THE COPYHOLD ACT, 1852.

1864. February 20. Before the LORDS JUSTICES.

[For marginal note see that to *In re Byron's Estate*, *supra*, p. 358.]

In this case Merton College had standing in Court the following funds, arisen from investments of moneys paid in by different railway companies for lands belonging to the college, which had been taken by them * under the powers of the Lands * 362 Clauses Consolidation Act, viz.:—

505*l.* 10*s.* 1*d.* consols, paid in by the Midland Railway Company;
260*l.* 3*s.* 3*d.* consols, paid in by the Wycombe Railway Company;
557*l.* 6*s.* 3*d.* consols, paid in by the Bedford and Cambridge Railway; and 206*l.* 17*s.* 0*d.* consols, paid in by the East Kent Railway Company.

The last-mentioned fund was the remnant of a sum originally paid in by the East Kent Railway of about 660*l.* stock, a part of which had already been laid out on an investment for the college, of which the London, Chatham and Dover Railway Company, in which the East Kent Railway Company had become merged, had paid all the costs.

Upon the petition of the college for the reinvestment of 1350*l.* out of its funds then standing in Court as above mentioned, the Master of the Rolls ordered that that sum should be raised by a sale of the three first-mentioned sums of stock, and so much of the last-mentioned sum of stock as, with the money to arise by the sale of the former, and two sums of 15*l.* 7*s.* and 16*l.* cash, part of 13,371*l.* 17*s.* 10*d.* cash in the bank to the credit of, &c., would be sufficient for the purpose; and directed the costs to be dealt with in accordance with the rule laid down in *Ex parte The Bishop of London. (a)*

The London, Chatham and Dover Railway Company appealed on the ground of hardship, seeking by their * appeal to have the order of the Master of the Rolls varied by a direction for the sale of the whole of the 206*l.* 17*s.* consols, and the application of the proceeds of such sale towards payment of the 1350*l.*; or, in the alternative, by a direction for payment by the appellants of so much only of the costs to be paid in pursuance of the order as would be proportionate to the amount arising from the sale of the part of the 206*l.* 17*s.* consols required for the purpose of completing the amount of the 1350*l.*

Mr. Hobhouse and *Mr. Kekewich*, appeared for the appellants; *Mr. Law*, for the College; *Mr. Sargent*, for the Midland Railway Company; *Mr. W. W. Streeten*, for the Wycombe Railway Company; and *Mr. Speed*, for the Bedford and Cambridge Railway Company.

Reference was made to the terms of the 80th section of the Lands Clauses Act, and to the cases of *Ex parte the Bishop of London, (a)* *Ex parte Christ Church, (b)* *In re Maryport and Carlisle Railway Act, 1855, (c)* *In re Byron's Estate. (d)*

(a) 2 De G., F. & J. 14.

(b) 9 W. R. 474.

(c) 32 L. J. N. S. Ch. 811.

(d) *Supra*, p. 358.

THE LORD JUSTICE TURNER. — It is impossible to lay down any rule which will not operate hardly sometimes.

The case of *Ex parte the Bishop of London* has laid down the rule to be adopted in these cases, and which * must be * 364 adopted as the general rule, in the absence of peculiar circumstances of extreme hardship to take a particular case out of the operation of such general rule.

The present does not appear to me to be a case stronger than that of *In re Byron's Estate*; nor is there any doubt that it was for the benefit of Merton College that these reinvestments should be made in different sums and at different times. I do not see any circumstances of peculiar hardship in the present case to take it out of the scope of *In re Byron's Estate*, or of the *Bishop of London's Case*.

THE LORD JUSTICE KNIGHT BRUCE. — I am not clear as to the order to be made in this particular case, but the Lord Justice's opinion decides it.

THE LORD JUSTICE TURNER. — I should have preferred that the smaller fund should have been taken first. There will be no costs of the appeal, as we are not agreed upon the order to be made.

1862. December 16, 17. 1863. January 16, 24. April 25. Before the Lord Chancellor Lord WESTBURY.

The 7th rule of the 10th of the Consolidated Orders, empowering the Court to order the service of a copy of a bill upon a defendant "in any suit" out of the jurisdiction, applies only to suits concerning land, stock, or shares within 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.¹

¹ This decision, together with *Foley v. Maillardet*, *post*, 389, and *Samuel v. Rogers*, *post* 396, was overruled in *Drummond v. Drummond*, L. R. 2 Ch. Ap. 32; S. C. L. R. 2 Eq. 335. See 1 Dan. Ch. Pr. (4th Am. ed.) 449, and note (6), 451, and cases in note (4). As to the mode of serving process upon absent defendants and persons residing out of the jurisdiction of the Court, in the United States, by publication or otherwise, see 1 Dan. Ch. Pr. (4th Am.

Where it appears on the face of the bill that a defendant was, at the time of the institution of the suit, resident in a foreign country, and that the suit does not relate to any of the subjects in which this Court is warranted in exercising jurisdiction against persons so resident, he may demur to the jurisdiction, although he has not moved to discharge an order for service out of the jurisdiction, but has appeared to the bill.¹

THIS was an appeal of the plaintiff from a decision of the Master of the Rolls, allowing a general demurrer to the bill.

The bill sought the administration of the trusts of a deed for the benefit of creditors executed by a partnership carrying on business in Scotland.

It is stated that the plaintiff was the executrix of a testator, named James Thomas Cookney, late of Lincoln's Inn Fields, solicitor.

It set out the trust-deed, which was dated the 9th of September, 1859, and the material parts of which were the following:—

“ We, William Lancaster, some time government inspector of mines residing at Stirling, now residing at the Portland Iron Works, near Harlford, in the country of Ayr, iron and coal master, and Alexander Bankier Freeland, some time of the city of Manchester, merchant, now residing at Treesbank, near Kilmar-nock, in the county of Ayr, iron and coal master, as trustees for the copartnery of Freeland and Lancaster, carrying on business as coal and iron masters, at and near Portland aforesaid; and

* 366 we, the said William Lancaster * and Alexander Bankier Freeland, as partners of the said company, considering that finding ourselves as copartners aforesaid unable to meet the demands against us, and to pay the debts owing by us as these became due, and being satisfied of the great disadvantage and ruinous consequences which might follow, if the operations of our works were suspended, we are desirous that the business should be continued, in the expectation that thereby our debts may be gradually cleared off, and that our works will, if necessary, be more readily disposed of as going works; and we have, at the request of our principal creditors, after named and designed, agreed to convey over the whole heritable and movable property belong-
ed.) 457, note (2); and as to the effect of such service, see the remarks of SARGENT J., in *Erickson v. Nesmith*, 46 N. H. 371, 377; *Spurr v. Scoville*, 3 Cush. 578; *Stephenson v. Davis*, 56 Maine, 75, 76.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 549, 550.

ing to us, as copartners aforesaid, to the trustee after named, in order that our works may be managed and conducted by him with the aid and assistance of the committee after named for a period of five years, or such longer or shorter period as he, with the aid and advice of such committee, shall think proper, or until a necessity arises for selling or disposing of the said works: Therefore we, the said William Lancaster and Alexander Bankier Freeland, as trustees and copartners aforesaid, do hereby dispoene, convey, and make over from us and from the said copartnery concern of Freeland and Lancaster, to and in favour of James Anderson, iron merchant in Glasgow, whom failing, by death, resignation, or removal, to and in favour of such other party as shall be appointed in manner after mentioned as trustee for the purposes after mentioned, and to the onerous dispoenees, or assignees of such trustee, all and whole the estate heritable and movable, real and personal, belonging to our said copartnery of Freeland and Lancaster, or to us as partners thereof or as trustees for their behoof, with the titles, vouchers, documents and instructions thereof, and also the whole leases of lands and minerals held by us, to, or in connection with said works."

*The deed proceeded to describe the land conveyed by * 367 it, as situated within the parishes of Riccarton and Kilmar-nock, and shire of Ayr.

By the declaration of trust, the trustee was empowered, under the direction and advice of the committee named in the deed, to carry on and conduct as theretofore the works for a period of five years from the date of the deed, or for such longer or shorter period as he and the committee should think proper, and under the direction and advice of the committee to pay and discharge the liabilities of the copartnery concern of Freeland and Lancaster, in manner mentioned in the deed, with the exception of the debts after specified due to the parties after named and designed. And in the event of it appearing to the trustee and committee that the works and leases, or any part thereof, could not be profitably carried on, the trustee and committee were thereby authorized to sell and dispose of the works and leases or any part thereof, and that either by public roup or private sale, and at such price or prices and upon such terms and conditions as the trustee and committee might approve of.

The profits and proceeds of the property were directed to be applied in paying and satisfying — first and regularly the interest, and next the principal, of the debts due to the parties after named, and that ratably and proportionably in case of a deficiency of funds, that was to say, a debt to the Union Bank of Scotland, amounting to 66,803*l.* 6*s.* 8*d.*, subject to deduction of the value of 1100 tons of pig-iron, valued at 2750*l.*; a debt to the above-named James Thomas Cookney, amounting to 25,000*l.*; a debt to the Glasgow and South-Western Railway Company, amounting * 368 to 1950*l.*; a debt to * John Freeland, amounting to 5000*l.*; and a debt to the trustees of William Blane, for 976*l.* 8*s.* 6*d.*

The deed appointed James Robertson manager, and James Reid cashier, both of the Union Bank of Scotland, and James Thomas Cookney, and John Freeland, and the survivors or survivor of them, a committee, under whose direction and superintendence the trustee was to act.

The bill stated that after the execution of this trust-deed, the ironworks were carried on by the trustee and committee, with results which the bill stated in detail.

The bill also, after alleging that the trustee and committee under the trust-deed had renewed or contemplated the renewal of the leases of the mines, stated that as the prices then ruled in the iron market there could be no profitable results from the management of the trust, and that there was no reasonable prospect of the works being carried on profitably; and the plaintiff submitted that it was manifestly for the benefit of all parties interested, that the trust should be wound up without any further delay. And after stating that there was due to the plaintiff, as executrix of Mr. Cookney, under the trust-deed for principal and interest, 26,107*l.* and upwards, and that there was also due to the defendants, the other creditors above specified, the whole of their principal and a large arrear of interest; that the legal estate in part of the trust hereditaments and premises was vested in the Union Bank of Scotland, which was a joint-stock bank duly registered and carrying on business in Glasgow, — the defendant James Robertson being the registered public officer thereof, and being entitled to sue and be * 369 sued in respect of all transactions in which the bank was concerned; and * that the Glasgow and South Western Railway was a joint-stock company, whose principal office was

in Glasgow: the bill prayed that the trusts of the trust-deed might be administered and wound up; that an account might be taken of the amount due to the plaintiff, and all other creditors under it; that all proper accounts might be taken, and directions given for realizing the trust property, and distributing the same among the creditors in a due course of priority; that the plaintiff might be indemnified from all liability under the leases; that the costs of the suit might be paid out of the trust property; and for further relief.

Copies of the bill were — by leave of the Court, under the Consolidated Orders (a) — served in the Isle of Man upon the defendant William Lancaster, and in Scotland upon the defendants the trustee, the committee, the Union Bank, and the Glasgow and South-Western Railway Company. All the defendants so served appeared, and demurred on the ground, that the plaintiff had not, by his bill, shown any title to discovery or relief.

The Master of the Rolls allowed the demurrer. The case is reported in the 31st volume of Mr. Beavan's Reports. (b)

* *Mr. Hobhouse* and *Mr. W. W. Mackeson*, for the appel- * 370
lant. — On the argument of a demurrer, the case must be dealt with as if it were at its hearing, and every fact alleged in the bill had been proved. It must be taken, therefore, that there has been a great increase of the debts of the trust concern since the date of the trust-deed. The discretionary power vested in the trustee and committee to carry on the works for five years, or such longer or shorter period as he and the committee shall think proper, is not a bare discretion: *Mortimer v. Watts*; (c) but a power which must be exercised for the benefit of the *cestuis que trustent*, to whom the donee must account for its exercise, or non-exercise: *Milsington v. Mulgrave*; (d) and being now — according to the effect of the allegations of the bill — exercised in

(a) Consolidated Orders X, Rule 7, which is as follows: "Where a defendant in any suit is out of the jurisdiction of the Court, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is or may probably be found, may order that a copy of the bill under the Stat. 15 & 16 Vict. c. 86, § 3, and if an answer is required, a copy of the interrogatories may be served on such defendant, in such place or country or within such limits as the Court shall think fit to direct."

(b) Page 452.

(d) 3 Madd. 491.

(c) 14 Beav. 616.

a mischievous and ruinous way, the Court has power to interfere and control such injurious exercise: *Dashwood v. Lord Bulkley*, (a) *De Manneville v. Crompton*, (b) *French v. Davidson*, (c) *Kekewich v. Marker*. (d)

The ground of the decision below was, that the interference and control of this Court could not be effectually exercised, as the statements of the bill showed the case not to be within the jurisdiction of an English Court of Justice. There is, however, nothing on the face of this bill to show that any of the defendants are domiciled in Scotland, or are out of the jurisdiction.

* 371 * Privity of contract, or the relationship of trustee and *cestui que trust*, constitutes a right which may be called a transitory right,—a right which follows the plaintiff and defendant wherever they may be.

[They referred to Story's Conflict of Laws, (e) *Angus v. Angus*, (g) *Earl of Athol v. Earl of Derby*, (h) *Carteret v. Petty*, (i) *Earl of Kildare v. Sir M. Eustace*, (k) *Penn v. Lord Baltimore*, (l) *Lord Cranstown v. Johnston*, (m) *Jackson v. Petrie*, (n) *Harrison v. Gurney*, (o) *Beckford v. Kemble*, (p) *Tullock v. Hartley*, (q) *Lewis v. Baldwin*, (r) *Beattie v. Johnstone*, (s) *Innes v. Mitchell*, (t) *Norris v. Chambres*. (u)]

If that is so, it is immaterial whether or not the defendants are out of the jurisdiction. The money in the present case was to be paid in England, and a great part of the property which might be affected by a decree of this Court is personal property only, and it cannot be assumed that the defendants are wholly without property within the jurisdiction of the Court, upon which by sequestration,

(a) 10 Ves. 230, 245.

(c) 3 Madd. 396.

(b) 1 V. & B. 354.

(d) 3 Mac. & G. 311, 326, *sqq.*

(e) Pl. 544 (5th ed.), citing *Lord Cranstown v. Johnston*, 3 Ves. 170; 5 Ves. 277.

(g) West. temp. Hardw. 23.

(h) 1 Ch. Ca. 220.

(i) 2 Swanst. 323, n.; S. C. nom. *Cartwright v. Pettus*, 2 Ch. Ca. 214.

(k) 1 Vern. 419.

(q) 1 Y. & C. C. C. 114.

(l) 1 Ves. 444.

(r) 11 Beav. 153.

(m) 3 Ves. 170.

(s) 8 Hare, 169.

(n) 10 Ves. 164.

(t) 4 Drew. 141; 1 De G. & J. 423.

(o) 2 J. & W. 563.

(u) 29 Beav. 246.

(p) 1 S. & S. 7.

any decree which the Court may make in this suit can be enforced. Even if such a decree were not directly available to afford the plaintiff her just rights, it might be made indirectly available for that purpose by the institution of * apt supplemental * 372 proceedings with that object in the Courts of Scotland.

Henley v. Soper, (a) *Russell v. Smyth*. (b) By those Courts the English decree, obtained neither by fraud upon nor in the absence of the defendants, would be carried into full effect. *Sheehy v. The Professional Life Assurance Company*, (c) *Cammell v. Sewell*, (d) *The Marquess of Breadalbane v. The Marquess of Chandos*. (e) This Court therefore is not at liberty to entertain considerations of the relative convenience or inconvenience of the *forum* chosen by the plaintiff in this case; more especially as recent legislation (Stat. 22 & 23 Vict. c. 63; 24 & 25 Vict. c. 11) has provided a machinery whereby any difficulties which may arise from incidental questions of Scotch law in the case may be easily disposed of.

Under these circumstances the Court, in the exercise of the discretionary powers conferred upon it by the legislature, made the order for service of the bill in the present suit upon the demurring defendants out of the jurisdiction: and we submit rightly. The plaintiff is entitled to and claims the full benefit of all statutory rights conferred by Acts of Parliament passed for the benefit of the Queen's subjects, irrespectively of the question whether those Acts may in principle have contravened the principles of international law; especially where the refusal of the rights conferred by the Acts would be tantamount to a refusal or defeat of justice. Among those rights are those conferred by the Statutes 3 & 4 Vict. c. 94, (g) and 4 & 5 Vict. c. 52, and the * 38d * 378

(a) 8 B. & C. 16.

(d) 8 W. R. 639.

(b) 9 M. & W. 810.

(e) 2 M. & C. 711.

(c) 13 C. B. 787.

(g) Stat. 3 & 4 Vict. c. 94, § 1, enacts as follows: "That the Lord Chancellor . . . is hereby required by any rules and orders to be . . . by him made . . . at any time within five years from the passing of this Act, to make such alterations as may seem expedient . . . in the form and mode of obtaining discovery by answer in writing . . . and generally in the form and mode of proceeding to obtain relief, and in the general practice of the Court with relation thereto . . . and all such rules, orders, and regulations shall be laid before both Houses of Parliament, if Parliament be then sitting, immediately upon the making

of the General Orders of the 8th of May, 1845, now replaced by the 7th rule of the 10th of the Consolidated Orders, made in pursuance of those statutes; by the conjoint effect of which statutes and orders, the jurisdiction of this Court has been materially extended; it not having been possible before to take further proceedings against a defendant served with a subpoena abroad, unless he appeared voluntarily. *Fernandez v. Cor-*

bin. (a)

* 374 * But the demurring defendants, by appearing, have submitted to the jurisdiction of this Court, (b) and are now estopped from objecting to it. And under any circumstances their proper mode of proceeding, if the service was improper, was not by demurrer: *Roberdeau v. Rous*, (c) but the course which was taken in *Whitmore v. Ryan*, (d) *Lewis v. Baldwin*, (e) *Meiklan v. Campbell*, (g) *Innes v. Mitchell*, (h) *Maclean v. Dawson*, (i) namely, a motion to discharge the order for service.

and issuing of the same; or if Parliament be not sitting, then within five days after the next meeting thereof. . ."

Stat. 4 & 5 Vict. c. 52, after reciting Stat. 3 & 4 Vict. c. 94, partially repeals it, and enacts (§ 1), that "every such rule, order, or regulation made in pursuance of the said recited Act shall, from and after the time in that behalf to be appointed by the Lord Chancellor . . . and if no time shall be so appointed, then from and after the making thereof, be binding and obligatory on the said Court, and be of like force and effect as if the provisions therein contained had been expressly enacted by Parliament: provided always, that if either of the Houses of Parliament shall, by any resolution passed at any time before such House of Parliament shall have actually sat thirty-six days after such rules, orders, and regulations shall have been laid before such House of Parliament, resolve that the whole or any part of such rules, orders, or regulations ought not to continue in force, in such case the whole, or such part thereof as shall be so included in such resolution, shall from and after such resolution cease to be binding and obligatory on the said Court. . ."

The 33d of the General Orders of May, 1845, was, with an immaterial exception, in the same terms as the 10th of the Consolidated Orders, Rule 7, stated above, p. 369, note, save that, instead of the words, "a copy of the bill under the Stat. 15 & 16 Vict. c. 86, § 3, and if an answer is required a copy of the interrogatories," found in the latter, the language of the earlier order was "the subpoena to appear to, or to appear to and answer, the bill."

(a) 2 Sim. 544.

(b) See *Beattie v. Johnstone*, 8 Hare, 169.

(c) 1 Atk. 543.

(g) 24 Beav. 100.

(d) 4 Hare, 612.

(h) 4 Drew. 141; 1 De G. & J. 423.

(e) 11 Beav. 153.

(i) 27 Beav. 25; 4 De G. & J. 150.

They also referred to *Mostyn v. Fabrigas*, (a) and Burge's Colonial and Foreign Laws. (b)

Mr. Selwyn and *Mr. Druce*, for the respondents, were called upon with reference to two points only, viz.: first, whether upon the merits of the case it might not be possible to exercise jurisdiction to declare that the trust was at an end, and remit the parties to have the estate wound up under a proper tribunal in Scotland; and secondly, whether, as a matter of procedure, the proper course on the part of the defendants who now demurred should not have been to apply to have the order for service out of the jurisdiction discharged.

Upon the first point, they argued that the state of the iron market, which was adverted to in the bill, was immaterial, and that the increase of the debts of the * concern was a circum- * 375 stance for which provision was made by the trust-deed itself. That a declaration, that the concern should be at once wound up, would amount to a total ouster of the discretion reposed by that deed in the trustee and committee; that that discretion could not be controlled in the absence of distinct allegations that the exercise of it was mischievous and ruinous; and that consequently, no case was made out of such a nature as to fall within the authorities cited on the other side.

Upon the second point they argued that, to enter an appearance and demur was not an incorrect mode of procedure, inasmuch as appearance, which was the first step towards making a defence, was no abandonment or waiver of any defence which the defendants might have, and it was clear upon the face of the bill that, even assuming the whole of the statements in it proved as facts, no decree could be usefully made by this Court. They cited on this point Braithwaite's Record and Writ Practice, (c) 41 Geo. 3, c. 90, § 6; *The Duke of Brunswick v. The King of Hanover*. (d)

They also commented on the cases cited on behalf of the appellant on the question of jurisdiction, and referred to a passage from Lord REDESDALE, (e) cited with approval by the Lord Justice TURNER in *Pennell v. Roy*. (g)

(a) Cowp. 161.

(c) Page 139.

(b) Vol. 3, page 398.

(d) 6 Beav. 1 (see p. 32); 2 H. L. Cas. 1.

(e) Mitf. Pl. p. 5.

(g) 3 De G., M. & G. 126, 138.

Mr. Hobhouse, in reply, submitted that the suit should be maintained as one which was necessary in order to give the plaintiff that full and adequate discovery to which she was entitled, but which she could not obtain by proceedings in the Scotch Courts.

The Lord Chancellor referred during the arguments to *Houlditch v. The Marquessa of Donegal* (a) and *Buchanan v. Rucker*. (b)

Judgment reserved.

1863. January 16.

The Lord Chancellor called the attention of *Mr. Hobhouse* to the case of *Hope v. Hope*, (c) and the case stood over to be further argued with reference to that authority.

January 24.

Mr. Hobhouse and *Mr. W. W. Mackeson*, for the appellant. — The 8th rule of the Preliminary Order of the Consolidated Orders, providing for the cases of variation of language in the Consolidated Orders as compared with the Orders originally made, puts the 7th rule of the 10th of those Orders into the position of the 33d of the General Orders of May, 1845, which latter, by virtue of the Stat. 8 & 4 Vict. c. 94, § 1, have the authority of an Act of Parliament; and *Whitmore v. Ryan*, (d) in which every objection was raised which can now be raised on behalf of the respondents, is an express authority that the 33d General Order of May, 1845, does not apply exclusively to suits concerning lands, stock or shares, within the Statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, (e) but gives the Court a discretion, accord-

(a) Beatt. 146; 2 Cl. & Fin. 470.

(c) 4 De G., M. & G. 328.

(b) 9 East, 192.

(d) 4 Hare, 612.

(e) The material parts of the statutes here referred to are the following: Stat. 2 Will. 4, c. 33, enacts as follows: "That from and after the passing of this Act it shall and may be lawful for the Courts of Chancery and of Exchequer in England respectively, if they shall so think fit, upon special motion of the complainant or complainants in any suit which has been or shall be instituted in such Courts respectively, concerning lands, or tenements, or hereditaments situate or being within that part of the United Kingdom called England or Wales, to order and direct that service in any part of the United Kingdom of Great Britain and Ireland, and in the Isle of Man respectively, of any subpoena

ing to the circumstances of the case, to permit service out of the jurisdiction in any suit whatever. *Hope v. Hope* (a) was a case *in pari materia*, and in that case are to be found some important observations of the Lord Chancellor, which materially affect the present case in the plaintiff's favour. At p. 344, his Lordship says, "It is not necessary for me to decide that the order was right in the first instance, because, even if by accident Mrs. Hope was not aware of the proceedings before the order was made, it is quite obvious that she had a full knowledge * of it * 378 immediately afterwards, and in fact she appears before the Court. I do not say that she enters an appearance in form, but she substantially appears by filing affidavits here and procuring further affidavits to be filed by other persons, in order to resist the present application. She has thus waived all formality, and to all intents and purposes has entered an appearance as a defendant." *Hope v. Hope* decided that the principle on which substituted service is ordered is, that there is reasonable ground to suppose that the service will come to the knowledge of the defendant. About that here there can be no question; and the case therefore, as analogical to the present, is a powerful authority in favour of the appellant.

Mr. Selwyn and *Mr. Druce*, for the respondents. — The 33d General Order of May, 1845, must be construed as framed with reference to the procedure of the Court only, and not as intended to extend its jurisdiction. That was no object contemplated by the Acts under the authority of which that order was drawn up.

or subpoenas, letter missive or letters missive, and of all subsequent process to be had thereon, upon any defendant or defendants in such suit then residing in such part of the said United Kingdom or Isle of Man, in which he, she, or they shall be so served, shall be deemed good service of or be made upon such defendant or defendants upon such terms and in such manner and at such time as to such Courts respectively shall seem reasonable. . ."

Stat. 4 & 5 Will. 4, c. 82, after referring to the Stat. 2 Will. 4, c. 83, extends all the provisions contained in that Act relating to suits instituted, concerning lands, tenements, or hereditaments situate in England or Wales, or in Ireland respectively, and makes them applicable "to all suits instituted in the said Courts respectively, concerning any charge, lien, judgment, or encumbrance thereon, or concerning any money vested in any government or other public stock or public shares in public companies or concerns, or concerning the dividends or produce thereof," and enacts accordingly.

(a) 19 Beav. 237; 4 De G., M. & G. 328.

The 7th rule of the 10th of the Consolidated Orders can stand on no better footing than the 33d General Order of May, 1845, of which it is a nearly verbatim repetition. (a)

Judgment reserved.

April 25.

THE LORD CHANCELLOR. — In explanation of my decision in this case, it is necessary to begin by referring to some well-established general principles.

* 379 * The Courts of civil judicature in every country sit to administer the municipal law of that country, and their jurisdiction therefore is limited and territorial. It is true, that the duty of yielding obedience to the law of his native country may follow the native subject of that country wherever he resides; for every nation has a right to bind its own natural-born subjects by its own laws in every place. Municipal law, therefore, may provide that judgments and decrees may be lawfully pronounced against natural-born subjects when absent abroad, and may also enact, that they may be required to appear in the Courts of their native country, even whilst resident in the dominions of a foreign sovereign. If a statutory jurisdiction be thus conferred, Courts of justice in the exercise of it may lawfully cite, and on non-appearance give judgment, in civil cases against natural-born subjects whilst they are absent beyond seas in a foreign land.

This jurisdiction depends on the statute or written law of the country. Where it is not expressly given it cannot be lawfully assumed. If such a law does not exist, the general maxim, applies "*extra territorium jus dicenti impune non paretur*."

But as international law in private rights is, so far as it has been clearly established, a part of municipal law, it follows, that the law of a country which gives to its municipal tribunals authority to exercise jurisdiction as to persons and things which are beyond the confines of their own territories, may also, consistently with international law, be extended in certain cases to persons who are not natural-born subjects. For where it is well settled by the comity of nations, that any question of private right falls to be decided by the law of a particular country, it would seem

(a) See *Kirwan v. Daniel*, 7 Hare, 347.

reasonable that the * Courts of that country should receive * 380 jurisdiction and the power of citing absent parties, though residing in a foreign land.

Thus, by way of example, it is generally agreed by European nations, that all questions relating to the ownership of land must be decided by the *lex loci rei sitæ*; that all questions relating to the succession or administration of the property of a deceased person, whether testate or intestate, belong to the judge of the domicile of the deceased; and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended they should be performed.

If, therefore, an action or suit be commenced in the Courts of a particular country relating to a subject which, by this consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such Courts the power of exercising complete jurisdiction, and therefore of citing absent parties, under the penalty if they do not appear of having judgment pronounced against them in their absence; but it is a jurisdiction that should be given and exercised with great caution, and only where it is clear on the principles of public law that the judgment against the absent party ought to be treated as binding by the Courts of foreign countries.¹

The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served in the territory of another, and summons a foreign subject to his Court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless * done with consent; which is assumed to be the fact, if * 381 it be done in a case where a foreign judgment would by international law be accepted as binding. For, besides the general maxim which I have already cited and which limits the jurisdiction of every tribunal to its own territory, there is another general rule, "*actor sequitur forum rei*," and both are violated when the territorial judge cites, and pronounces a judgment against, a person who does not appear, and is absent in another territory.

There are, therefore, two grounds on which the legislature of

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 457, note (2); SARGENT J., in *Erickson v. Nesmith*, 46 N. H. 371, 377; *Spurr v. Scoville*, 3 Cush. 578; *Stephenson v. Davis*, 56 Maine, 75, 76.

any country is warranted in conferring on its civil tribunals an extra-territorial jurisdiction, — one the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance; the other the right which it receives by international law, that is, from the consent of nations, of summoning all persons interested wherever resident, where the subject of suit arises or is situate within its own territory and falls to be determined by its own law and the judgment of its own Courts of Civil Judicature.

In conformity with these principles the Act of the 2 Will. 4, c. 33, was framed and passed, by which it was enacted that it should be lawful for the Court of Chancery in England, in any suit relating to land in England, to order its process to be served on a defendant residing within any part of the United Kingdom; and a similar power is given to the Court of Chancery in Ireland in suits relating to land in Ireland.

The effect of the subsequent Act of the 4 & 5 Will. 4, c. 82, is to give to the Courts of Chancery in England and Ireland respectively a limited and guarded power in suits concerning land in England and Ireland respectively, or concerning “any charge,

lien, judgment or encumbrance thereon, or concerning any

* 382 money vested * in any government or other public stock,

or public shares in public companies or concerns, or concerning the dividends or produce thereof,” of directing that process may be served on any defendant in such suit, although resident in any place out of the United Kingdom, and of proceeding upon such service as if it had been made within the jurisdiction.

Previously to these statutes the Courts of Chancery in England and Ireland had not, nor without these statutes would they now have, any jurisdiction or authority to serve process upon any defendant, whether a natural-born subject or not, who was residing out of the territorial limits of their respective jurisdictions; unless, indeed the defendant were shown to have absconded to avoid such service: and it is a jurisdiction which depends on the nature of the suit, and is confined entirely to such suits as answer the description contained in the last-mentioned statutes.

The jurisdiction of the Courts of Common Law was equally limited and territorial with the jurisdiction of the Court of Chancery. Before the Common Law Procedure Act of 1852, the Courts of Common Law at Westminster had no jurisdiction to order, or

to proceed upon, the service of a writ on a defendant residing in a foreign country. By the Common Law Procedure Act of 1852, § 18, it is enacted to the effect that, in case any defendant, being a British subject, is residing out of the jurisdiction of the Superior Courts in any place, except Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form described in the schedule; and it shall be lawful for the Court upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the * jurisdiction, and that the writ was personally * 383 served and so forth, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such conditions as to the Court shall seem fit.

The jurisdiction of the Courts of Common Law, therefore, in the case of defendants residing out of the jurisdiction, is much more limited than the jurisdiction of the Court of Chancery. It is confined to British subjects, and to suits founded on a cause of action which arose within the jurisdiction, including breaches, wherever committed, of contracts made within the jurisdiction; that is to say, if the cause of action be a tort or breach of duty, that must have arisen within the jurisdiction, but if it be breach of contract, it is enough if the contract be shown to have been made within the jurisdiction.

It is plain, therefore, that the legislature, in conferring this extent of extra-territorial jurisdiction on the Superior Courts of Chancery and Common Law, was careful to keep much within the limits allowed by international law, as they are recognized by all civilized nations; and that any attempt by a Court, either of Equity or Common Law, to exercise jurisdiction beyond these statutory limits is simply unauthorized and void.

Any rules which a Court of justice may make touching its procedure must, of course, be taken as intended to apply only to such jurisdiction and authority as it has the right to exercise.

We are bound to suppose that a Court of justice, in its rules and orders, does not mean to usurp a jurisdiction that does not belong to it, or to transgress the limits which have been set to its authority by the legislature. * It cannot be supposed * 384 to have intended that which would be illegal and void.

By various statutes powers have been given to the Court of Chancery to make rules and orders for regulating its procedure,

and improving the mode of exercising its jurisdiction. The power given by the 63d section of the Improvement of Jurisdiction of Equity Act (the 15 & 16 Vict. c. 86), is perhaps, having regard to the purposes of the Act, the most comprehensive power. By it the Lord Chancellor, with the advice and assistance of three of the other Judges of the Court, is empowered and required, "from time to time to make general rules and orders for carrying the purposes of this Act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said Court in respect of the matters to which this Act relates," and so on; and the powers given by the other statutes are similarly but not so extensively worded; but it was not the purpose of any one of these statutes, nor is it one of the matters to which they relate, to extend or amplify the jurisdiction of the Court against persons residing in foreign countries.

That jurisdiction still remains in the limited form in which it was conferred by the Statutes of Will. 4, which have been stated. A new procedure, under an existing jurisdiction, may be created by orders, but a new jurisdiction cannot.

By the 7th rule of the 10th of the Consolidated Orders of the Court, which are now in operation, it is ordered, that where a defendant in any suit is out of the jurisdiction of the Court, the Court upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is, or

* 385 may probably * be found, may order that a copy of the bill under the statute 15 & 16 Vict. c. 86, § 3, and, if an answer is required, a copy of the interrogatories, may be served on such defendant in such place or country, or within such limits as the Court shall think fit to direct. This order must be bounded by the limits of the authority from which it emanates, and as the authority exists only with respect to such suits as are defined in the 4 & 5 Will. 4, the word "suit" in the order must be restricted to mean a suit in which the Court has authority and jurisdiction to bind, by its decrees and orders, persons named as defendants who are resident abroad, and have not appeared in the suit. But the persons who may be so bound, are the defendants in such suits only as are described in the Statutes of the 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

It would be absurd to suppose that the authority to make orders for the improvement of procedure involved authority to usurp a

new jurisdiction, either in respect of persons or of things; and it is the duty of the Court in all cases to adopt a construction that does not involve a manifest absurdity. The authority was given for the improvement of the manner of administering the existing jurisdiction. If it could be used to enlarge the territorial extent of the Court's authority, it might be equally used to enlarge the subject-matter of its jurisdiction, and orders might be made enabling the Court to try actions of assault, or grant divorces *a vinculo matrimonii*.

It is unnecessary to pursue this further. It is in my opinion clear, that the word "suit," in the 7th rule of the 10th order, must be taken to denote such suits only as are described in the two Acts of Will. 4.

* It follows that, in the present case, the order to serve * 386 a copy of the bill upon the defendants in Scotland was beyond the power of the Court, and not warranted by the order, according to the interpretation which I have put upon it; inasmuch as this suit, as will be hereafter shown, cannot possibly be brought within the description contained in either of the statutes of Will. 4, which have been already referred to.

But it is urged in argument, that these considerations are immaterial, inasmuch as the defendants have actually appeared under the process and must, therefore, be considered as having been duly convened. But, although it is true that the defendants have appeared, and have never moved to discharge the order of service, yet they have demurred to the jurisdiction of the Court; and if it appears upon the face of the bill, that the defendants at the time of the institution of the suit were resident in a foreign country, and that the suit does not relate to any of the subjects in which this Court is warranted in exercising jurisdiction against persons so resident, it follows, that the demurrer ought to be allowed for the same reasons on which I hold, that the order for service of process ought not to have been made. The only effect of appearance is to throw upon the demurring defendants the obligation of proving from the statements in the bill itself, that the case is one in which the Court cannot claim a right to exercise jurisdiction.

It may be generally true, that whatever may be the locality or nature of the subject-matter, this Court, which acts *in personam*, will, if there be matter of equity, exercise jurisdiction against a

defendant who appears in Court, and does not challenge the jurisdiction for sufficient grounds apparent upon the record.

* 387 * But if those grounds are apparent, and the defendant appears for the purpose of demurring to the jurisdiction, the same reasons that would be effective for discharging the order of service are equally available for the allowance of the demurrer; and first, I think, it plainly appears upon the face of the bill itself, that all the demurring defendants were, at the time of filing the bill, resident in Scotland, out of the jurisdiction of this Court, and where it must be taken they still reside; and, secondly, the origin of the right to sue is a trust-deed, or contract made in Scotland in the Scotch form, the trusts of which the bill seeks to have administered, and the construction of which, as well as the extent and nature of the rights and liabilities it creates, must be ascertained and determined wholly by the law of Scotland.

The principal part of the property to which this deed relates is real estate situate in Scotland, the right to which this suit seeks to determine; and, further, to have a *forum concursus* set up in this Court, to which all the creditors of the Scotch company shall resort, obliging them to quit the Courts of the country where they reside, and by the laws of which their rights must be determined, and to bring their rights and claims to the bar of a foreign tribunal.

The law by which every question in the cause would fall to be determined in Scotch law, of which this Court knows nothing, save as it may be informed of it by the testimony of witnesses, and acting on the principles of the recent Act of 24 Vict. c. 11, it may have to make frequent references to the Courts of Scotland, to whom the whole subject naturally belongs, and by whom it may be conveniently determined.

* 388 * It is scarcely possible to imagine any combination of circumstances in which, more than in this case, this Court would be forbidden to exercise jurisdiction by every principle of law as well as every consideration of expediency.

By the Common Law Procedure Act, authority is not given to serve parties who are resident in Scotland or Ireland, and for the plain reason, that in such cases the plaintiff may resort to the Courts of those countries, but this bill is framed on the very opposite of the established rule, "*actor sequitur forum rei*."

Every decree or order which the Court might make must be carried to Scotland to be enforced, and have practical operation

given to it, but the Courts of that country could not be required to be auxiliary to any such purpose, or in any manner to recognize the judgment of this tribunal.

I am, therefore, bound by every consideration to give no aid to the plaintiff in this suit. I concur in the decision of the Master of the Rolls, and dismiss this appeal with costs.

* FOLEY v. MAILLARDET.

* 389

1864. January 29. Before the Lord Chancellor Lord WESTBURY.

The language of the 7th rule of the 10th of the Consolidated Orders purporting to authorize the Court to order the service of a copy of a bill upon a defendant "in any suit" out of the jurisdiction, is in excess of the statutory authority under which the orders were made, and the operation of the rule must be confined to suits concerning lands, stock, or shares within the Statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.¹

Where the plaintiff had introduced into his bill statements as to the subject of the suit, bringing it within the last-mentioned statutes, and the defendant, on an application to discharge an order for service abroad, had filed an affidavit to disprove the statements: *Held*, that the affidavit which had been rejected in the Court below ought to be received.

THIS was an appeal from a decision of the Vice-Chancellor STUART, refusing to discharge an order made on the 5th of December, 1863, in a legatee's suit, for service in Scotland of a copy of the bill and interrogatories upon the appellant, who, at the time of the institution of the suit, was the sole legal personal representative of the testatrix in England, but permanently resident in Scotland.

The bill alleged that the appellant had in her possession, or under her control, divers large balances or sums of money, and also divers parliamentary or other stocks or funds, and also divers real and personal securities, belonging to or arising from the personal estate of the testatrix, and far more than sufficient for the satisfaction of the claim of the respondent in the suit; and that the appellant had also in her possession or under her control to a

¹ See *Cookney v. Anderson*, *ante*, 365, note (1).

large amount assets of her late husband, whose legal personal representative in England, and also in Scotland, the bill alleged her to be; and by whom, conjointly with the appellant, the bill further alleged the assets of the testatrix, to a large amount, to have been from time to time received.

The appellant having been served with the bill and
 * 390 * interrogatories out of the jurisdiction in pursuance of the order of the 5th of December, 1863, on the 5th of January, 1864, obtained, in accordance with the *dictum* of the Lord Justice TURNER, in *Maclean v. Dawson*, (a) an order enabling her to enter and accordingly entered with the registrar a conditional appearance to the bill; and having filed an affidavit, denying, with respect to the estates of the testatrix and of the deponent's late husband, and with respect to the deponent herself, that the suit concerned any lands, tenements, or hereditaments, or any charge, lien, judgment, or encumbrance thereon, or any money vested in any government or other public stocks, or public shares in public companies or concerns, or the dividends or produce thereof, within the provisions of the Statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, (b) moved on the 11th of January, 1864, before the Vice-Chancellor, that the order of the 5th of December, 1863, might be discharged, and that the appellant's costs of the application, and consequent thereon, and also such costs as had been occasioned to her by reason of such order having been obtained and served upon her, might be taxed and paid by the respondent to the appellant.

The Vice-Chancellor declined to admit the appellant's affidavit, and refused the motion, and from this decision the present motion was made by way of appeal.

Mr. Graham Hastings, for the appellant. — *Cookney v. Anderson*, (c) shows that the 7th rule of the 10th of the Consolidated Orders applies only to * cases within the Statutes 2
 * 391 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82; and, doubtless, the allegations in this bill were framed with the object of showing, that the present case was one within that category. Whether, however, that was or was not the object of the introduction of those alle-

(a) 4 De G. & J. 150, 155.

(b) Stated above, p. 377, note.

(c) *Supra*, p. 365. The material parts of the statutes and orders referred to in the present case will be found stated in the notes to that case.

gations, not only are they, as they stand, insufficient in themselves, but their truth is disproved by the appellant's affidavit, which, if admissible, reduces the case within the authority of *Cookney v. Anderson*, and renders it one in which no order for service out of the jurisdiction ought to have been granted. The question, therefore, is whether or not that affidavit is admissible. The Vice-Chancellor thought it was not. I submit, however, that it is, and that its admissibility is at once settled by established practice: *Davidson v. The Marchioness of Hastings*, (a) *Whitmore v. Ryan*, (b) *Innes v. Mitchell*, (c) *Maclean v. Dawson*; (d) and in accordance with general convenience. The analogous practice on motions to dissolve injunctions obtained *ex parte* is also in favour of the admissibility of this affidavit; and if it be admitted, *Whitmore v. Ryan*, which will probably be relied upon on the other side, is in reality no authority upon the present case; being as it was a decision upon the 33d of the General Orders of May, 1845, which were made within the period of five years from the passing of the Statute 4 & 5 Vict. c. 52, and were not objected to by Parliament within thirty-six days after they were laid before it; and which, therefore, acquired by virtue of that statute, and that of 3 & 4 Vict. c. 92, the force of an Act of Parliament. The present case arises under the Consolidated Orders now in force, to which, as made after the expiration of the period of five * years * 392 mentioned in the statutes just referred to, and not under the authority of either of them, no such force can be attributed.

Mr. Prendergast, for the respondent. — Until the decision in *Cookney v. Anderson*, the practice of the Court was considered as settled, by a series of decisions, beginning with that in *Whitmore v. Ryan*. In *Whitmore v. Ryan*, every argument was advanced to induce the Court to curtail the exercise of the jurisdiction in question, but the Vice-Chancellor, without hearing the other side on the question of jurisdiction, held, that the power, although discretionary, was one which might be exercised in any case whatever. The 7th rule of the 10th of the Consolidated Orders, the language of which, with such alteration only as is necessary to adapt the 33d Order of May, 1845, to the altered practice, is *verbatim* the same as that of the last-mentioned order, has not hitherto been

(a) 2 Keen, 509.

(c) 1 De G. & J. 423.

(b) 4 Hare, 612.

(d) 4 De G. & J. 150.

considered as introducing any alteration in principle. The Consolidated Orders were drawn up under the authority of the Statute, 15 & 16 Vict. c. 86, § 63; and Parliament not having interfered in the manner prescribed by the 64th section of the last-mentioned Act, these orders have acquired the validity of an Act of Parliament. The Consolidated Orders, therefore, stand on the same footing as the Orders of the 8th of May, 1845, and *Whitmore v. Ryan*, is a decision expressly in point, and in the respondent's favour. The case is analogous to those of by-laws made under the post-office or railway Acts. In *The Official Manager of the National Provident and Investment Association v. Car-*

* 393 *stairs*, (a) the bill did not *explicitly show that the defendant was possessed of property within the provisions of the Statutes 2 Will. 4, c. 33, or 4 & 5 Will. 4, c. 82; and the defect was made good by an affidavit on the part of the plaintiff, showing the existence of shares in England. In the present case, the defect does not exist. The allegations in the bill answer the same purpose as the affidavit did in the case cited.

[THE LORD CHANCELLOR. — There are parliamentary stocks and funds in Scotland, and the allegations do not necessarily show the existence of such stocks or funds in England. Even, if they did, a false statement made in order to found the jurisdiction may be disproved by affidavit.]

If the allegations are insufficient, the question reduces itself to this: whether or not, in their absence, the Court had jurisdiction to make the Order of the 5th of December, 1863. I submit that it had. *Steele v. Stuart* (b) is a clear decision of the Vice-Chancellor WOOD, that *Cookney v. Anderson* has not necessarily overruled *Whitmore v. Ryan*; and his Honor expresses his opinion, that the Orders of May, 1845 not having been objected to by Parliament, had thus obtained its sanction.

[THE LORD CHANCELLOR. — That sanction could only have been to orders made in pursuance of statutory powers. So far as the orders may have been in excess of the statutory powers, they do not become binding merely because Parliament has not interfered

(a) 11 W. R. 866.

(b) 12 W. R. 247.

to eliminate that excess. The interference of Parliament is simply to see if the statutory powers have been properly exercised ; and any excess remains an excess, although its existence may have escaped the notice of Parliament.]

A reply was not heard.

* THE LORD CHANCELLOR. — I am bound to adhere to my * 394 own decision in *Cookney v. Anderson*, and I will neither myself attempt, nor permit on the part of the Court any attempt to be made, to assume judicial powers in cases where they do not exist. The language of the 64th section of the Improvement of Jurisdiction of Equity Act, to which my attention has been called, must receive a reasonable interpretation. I cannot say that that language was intended to sanction an order not warranted by authority, or to give to any order a binding force, because that order and the excess committed by it remained unnoticed by Parliament and escaped objection. That is not my interpretation of the statute. [His Lordship read the 64th section and proceeded.] But such orders only could “cease” to be binding as had previously been binding. The parliamentary sanction does not extend to such orders as never were binding at all. It is very much to be lamented that the Court should have made an order such as this now in question. I do not find fault with the course taken by Vice-Chancellor WIGRAM in *Whitmore v. Ryan*, where he considered it incumbent upon him to obey the language of the Order of May, 1845, which was in question in that case. Probably his Honor had no alternative. But the construction of the corresponding rule of the Consolidated Orders, which is now in question, must be determined having regard to the preamble and the statute under which they were made. In the case of *Cookney v. Anderson* I arrived at the conclusion, to which I adhere, that the language of the rule was in excess of the parliamentary powers under which the Consolidated Orders were made ; and that, consequently, such a construction should be put upon that language as would reduce the order within the limits of * the * 395 power prescribed by the Act for its creation. The orders must be so interpreted as to be a compliance with and not a transgression of the parliamentary powers by virtue of which they are made.

In the present case, there is nothing to warrant an order to bring the appellant within the jurisdiction of the Court. Whoever takes the first step in so doing must abide by the consequences of his act. Those consequences would be a decree made in the personal absence of the appellant, which decree would have to be enforced by any available means in the power of the Court; and should the person against whom it is made at any time be found within the jurisdiction, the process of enforcing the decree would have to be carried into effect. This would be a course quite at variance with natural justice: a course which would give rise to a case like that which arose in *Buchanan v. Rucker*, (a) and would put the Court into a like position. The course pursued by this Court would be plainly mistaken, if without the sanction of the legislature it were to afford power to bring persons, in whatever part of the world situate, within the jurisdiction, in order to determine questions which this Court has no better right to determine than the Courts of the country where the party to the suit is resident, and which relate to property over which this Court has no right to assume any jurisdiction. I shall discharge the order of the Vice-Chancellor under appeal, and also the Order of the 5th of December, 1863, which the original notice of motion sought to discharge.

Mr. Graham Hastings, referring to the terms of that notice of motion, asked for the costs of the present * appeal and also for the costs mentioned in that notice of motion.

THE LORD CHANCELLOR. — I cannot give the costs in a case of this description.

(a) 9 East, 192.

SAMUEL v. ROGERS.

1864. February 17. Before the Lord Chancellor Lord WESTBURY.

[For marginal note see that to *Cookney v. Anderson*, *supra*, p. 365.]

THIS was an appeal from a decision of Vice-Chancellor Wood refusing leave to serve the sole defendant, who was described in the bill as resident at Dublin, out of the jurisdiction, with a copy of the bill and interrogatories, and notice of motion for an injunction "at Dublin or elsewhere in Ireland."

The bill sought an injunction against the defendant, restraining him from advertising for sale any articles of clothing under any name in which the word "Sydenham," to the use of which, as a prefix, the plaintiff claimed an exclusive right, occurred; and from selling any articles of clothing as and for "Sydenham" articles, and from selling or offering for sale any articles of clothing not manufactured by the plaintiff, in such manner and form as to represent or lead to the belief that the same had been produced by the plaintiff; and for an account and costs.

* The appeal motion had been originally made before the * 397 Lords Justices, who, in consequence of the decision of the Lord Chancellor in *Cookney v. Anderson*, (a) expressed no opinion on the matter, but suggested that the case should be mentioned to his Lordship.

Mr. Clement Swanston now applied accordingly, and referring to *Blenkinsopp v. Blenkinsopp*, (b) which had not been cited in *Cookney v. Anderson*, and in which Lord COTTENHAM had held, that there was no necessary connection between the 33d of the General Orders of May, 1845, and the previous Acts of Parliament, 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82, asked that the matter might be reheard by the full Court of appeal.

THE LORD CHANCELLOR.—I cannot accede to the application. The orders of the Court must be construed with reference to the statutes under which they are made: and neither will I depart

(a) *Supra*, p. 365.

(b) 2 Ph. 1.

from my decision in *Cookney v. Anderson*, nor is it competent for the full Court of appeal to do so. If the defendant in the present case is in Ireland, go you to Ireland and sue him there.

Leave refused.

* 398 * In the Matter of the Estate of ÉMILE ALCAN, deceased.

COHEN v. ALCAN.

1864. April 14. Before the LORDS JUSTICES.

Leave given to serve an administration summons (relating to stock and shares in England) on a defendant abroad.

MR. JESSEL moved, upon behalf of the plaintiff, for leave to serve the defendant, the administrator of an intestate's estate, with a common administration summons in France, out of the jurisdiction. Part of the estate consisted of stock and shares in England, within the meaning of the Statute 4 & 5 Will. 4, c. 82, (a) and the Master of the Rolls, to whom the application was in the first instance made, thinking that the proceeding by summons constituted a "suit" within the meaning of that Act, was in favour of acceding to the application; but thought that, after the decision of Vice-Chancellor KINDERSLEY in *Lester v. Bond* (b) the application should be renewed before the Court of appeal. The present application was accordingly made.

THE LORD JUSTICE KNIGHT BRUCE. — I always differ from the Vice-Chancellor KINDERSLEY with diffidence; but in this case I agree with his Honor the Master of the Rolls. I think that the proceeding constitutes a suit within the meaning of the Act of William the Fourth.

THE LORD JUSTICE TURNER. — I think so too. The Vice-Chancellor seems, in *Lester v. Bond*, to have been much influenced by the special circumstances of that case.

Order for service made accordingly.

(a) Stated above, p. 377, note.

(b) 1 Dr. & Sm. 392.

* In the Matter of the Estate of JOHN M'VEAGH, * 399
deceased.

M'VEAGH v. CROALL.

1863. February 14, 18. Before the Lord Chancellor Lord WESTBURY.

Where, in the course of prosecution of an administration decree in Chambers, the Judge heard personally and refused an application of a creditor for an order requiring executors to make an affidavit as to the possession of documents, and also refused to adjourn the application into Court: *Held*, not a proper case for an appeal directly from Chambers.¹

THIS case first came on to be heard before the Lord Chancellor as an appeal directly from a decision of the Vice-Chancellor STUART made in Chambers refusing, with costs, an application for an affidavit as to documents.

A decree having been made for the administration of the estate of Mr. John M'Veagh on summons taken out by a legatee under his will, Mr. Gilbert, the present appellant, carried in a claim to rank as a creditor against the estate, and he applied at Chambers for an order that the defendants, the executors of the testator, might file an affidavit as to documents in their possession. The Vice-Chancellor heard the matter in Chambers, attended only by the solicitors of the parties, and made the order under appeal in person, refusing to adjourn the matter into Court to be argued by counsel; and from the order so made Mr. Gilbert appealed.

March 5. Before the LORDS JUSTICES.

A person having come in to prove as a creditor under a common decree for the administration of assets, and having produced *prima facie* evidence in support of his claim, an order was made upon his application directing the executors to file an affidavit as to their possession of documents relating to the claim or to any item in it.²

Mr. G. Lake Russell, for the appellant, stated what had taken place before the Vice-Chancellor, and was about to open the appeal,

¹ See *Snowdon v. Metropolitan Railway Co.*, *post*, 408; 2 Dan. Ch. Pr. (4th Am. ed.) 1474.

² See 2 Dan. Ch. Pr. (4th Am. ed.) 1821, 1825.

when the Lord Chancellor called his attention to the question whether his Lordship could hear an appeal from Chambers
 * 400 under circumstances * like those existing in the present case; and the case stood over to be argued on that point.

Mr. G. Lake Russell, for the appellant. — Although this Court will not, in general, hear appeals directly from Chambers where the parties have not had an opportunity of being heard by counsel, *Stroughill v. Gulliver*, (a) the rule is otherwise where, as in the present case, the Judge in Chambers has made the order in person, and declined to adjourn the matter into Court to be argued by counsel. *Ridgway v. Newstead*. (b) The provision in the Master in Chancery Abolition Act (15 & 16 Vict. c. 80, § 15) for the enrolment of orders made at Chambers shows that they were contemplated by the legislature as being liable to become the subjects of appeal, and it is at once unnecessary and expensive to put the proposed appellant to the necessity of making a formal application in Court on which to found an appeal, in the manner stated by the Master of the Rolls, in *The York and North Midland Railway Company v. Hudson*, (c) to have been adopted by him in cases of objections to chief clerk's certificates.

The Lord Chancellor, without calling upon *Mr. W. Morris* for the plaintiff, or *Mr. Swanston*, for the defendants, the executors, said that it would be at once mischievous and productive of a multiplication of appeals, and of inconvenience, delay, and expense, to allow of appeals directly from orders made in Chambers in cases like the present, and expressed his unwillingness to sanction any such practice, remarking that when a Judge in Chambers, in the exercise of his discretion, declined to
 * 401 adjourn a case into Court to be argued by counsel, * such an exercise of discretion should not be interfered with. His Lordship consequently declined to hear the appeal, and refused the motion, but without costs.

March 5.

The appellant then renewed his application to the Vice-Chancellor in Court, which application his Honor, adhering to the

(a) 1 De G. & J. 113. (b) 4 De G. & J. 15. (c) 18 Beav. 70.

opinion which he had expressed in Chambers upon the merits of the case, refused, with costs; and from the order so made the appellant appealed, and the case came on to be heard upon the merits before the Lords Justices.

Mr. W. M. James and *Mr. G. Lake Russell*, for the appellant. — The ground on which the Court, after a decree for administration, restrains a creditor from suing the executors at law is that the decree is in the nature of a judgment for all the creditors. *Whitaker v. Wright.* (a) A creditor therefore coming in to prove under a decree brings with him all his legal rights. Now it has been urged against us that it never was the practice in the Masters' offices to order production in a case like the present. The ground of that was that in former days production could not have been obtained by the creditor in an action at law; but the Common Law Procedure Act (17 & 18 Vict. c. 125, § 50) has altered the practice there, and a plaintiff at law has now the same right to discovery as a plaintiff in equity. If then the appellant had brought an action, he could have obtained a common-law order for the production of documents; and this Court, which will not allow him to sue at law, will not place him in a worse position as to discovery than he would have been at law, whither he cannot now be sent. * 25 & 26 Vict. c. 42. The case of * 402 *Hyde v. Edwards* is very analogous to the present. The decision which led to that suit is reported under the name of *In re the London Dock Company.* (b) A reference having been directed, Hyde, who went in to prove himself heir, alleged that another person, who took in a similar claim, had in his possession documents which would prove Hyde's title, and accordingly Hyde applied for their production, which was refused by the Master of the Rolls. Hyde then filed a bill, a demurrer in which was overruled by Lord LANGDALE; (c) but an attempt to stay proceedings in the suit was successful. (d) Lord COTTENHAM affirmed this decision, but at the same time held that the Master of the Rolls had erred in refusing the order for production. It would seem from the report (e) as if the order for production had been made

(a) 2 Hare, 310, 314.

(d) 12 Beav. 253.

(b) 11 Beav. 78.

(e) 1 Mac. & G. 410.

(c) 12 Beav. 160.

by consent, but it is evident from the order (a) that the
 * 403 only consent * was that an order should be made in the
 matter without any formal application for the purpose,
 the application having been made in the cause only. The result
 was that the claimant obtained the evidence and established his
 title by it. Here the Vice-Chancellor sends us to file a bill for
 the purpose of obtaining a production which might just as well be
 ordered without one. In former times the executor, after decree,
 could not obtain an injunction to restrain a creditor from proceed-
 ing at law, except by filing a bill for the purpose. *Paxton v.*
Douglas. (b) The Court has latterly adopted a more convenient
 course, and it will adapt its rules of procedure to the wants of
 mankind in favour of a creditor as well as against him. By 15
 & 16 Vict. c. 86, § 45, an administration order on summons is to
 have the same effect as the common decree. The old form of
 decree directed the "parties" to produce documents as the Master

(a) L. C. — 26 November, 1849.

Between James Hyde and Sarah his wife, plaintiffs; Thomas Edwards, &c.,
 defendants; and in the matter of the London Dock Company:—

Whereas Mr. R. Palmer and Mr. Elderton, of counsel for the plaintiffs, this
 day moved and offered divers reasons unto the Right Honorable the Lord High
 Chancellor of Great Britain, that the order made by his Lordship the Master of
 the Rolls in this cause on the 5th day of November instant might be discharged,
 and that the above-named Thomas Edwards might be ordered to pay to the
 plaintiffs the costs of the application for the said order to be taxed. In the
 presence of Mr. Walpole and Mr. Stevens of counsel for the defendant Thomas
 Edwards, and Mr. Lloyd of counsel for the defendants W. A. Blake and Frances
 his wife, whereupon and upon hearing [affidavits by certain persons named] and
 two several orders made in the said matter, dated respectively the 8th of July,
 1841, and the 22d of April, 1843, read, his Lordship does not think fit to make
 any order upon the said motion, but doth order that the parties to the orders
 made in the said matter, and dated respectively the 8th of July, 1841, and the
 22d of April, 1843, and all other parties claiming or who shall claim under the
 same orders or either of them, do produce upon oath before the Master, to
 whom the said orders stand referred, as he shall direct, all deeds, books, papers,
 and writings in their or any of their custody or power relating to the matters in
 question under the said orders. And it is ordered that the said parties be
 examined upon interrogatories before the said Master as he shall direct. And
 it is ordered that the above-named plaintiffs and the defendants Edmund Dee,
 &c., be at liberty to renew their claim under the said orders. And it is ordered
 that all or such of the parties claiming under the said orders be at liberty to
 attend the proceedings under the same as the said Master shall direct. Reserve
 costs.

(b) 8 Ves. 520.

should direct. Seton's Decrees. (a) The Judge in Chambers has now all the powers of the Masters, and it is part of the ordinary jurisdiction to order production of documents. *Hart v. Montefiore*, (b) *Re Flood*. (c) Now a creditor is substantially a party. *Hatch v. Searles*. (d) The common form of decree directed that * the "parties" should be examined on interrog- * 404 atories; and it was treated as clear in *Paxton v. Douglas* (e) that a creditor who came in to prove must submit to be examined on interrogatories; he was therefore regarded as a party for that purpose, and it cannot be the rule of the Court that he is subject to all the liabilities of being a party without having any of the advantages of that position. •

Mr. W. Morris, for the plaintiff. — I do not dispute the jurisdiction of the Court to make such an order as is asked for; but under the old practice the Master had a discretion, and that discretion is now to be exercised by the Judge. Under the Common Law Procedure Act there must be an affidavit showing that some documents bearing on the case are in the possession of the party against whom the application is made. The appellant has not shown that the executors have documents of such a nature that he ought to be allowed to inspect them. The summons originally taken out was for the production of documents generally, not merely of documents relating to the particular claim; and it was not supported by any affidavit that there were documents relating to the claim. It would be most oppressive if any person, by setting up a claim to be a creditor, could obtain production of all the documents relating to the estate.

Mr. Clement Swanston, for the executors.

Mr. W. M. James, in reply. — The Vice-Chancellor decided this case solely on the question of jurisdiction, and the argument against us proceeds on the ground that we set up a case which we * never in fact did set up. We never asked for * 405 any documents but those relating to our own claim.

(a) 1st ed. p. 11.

(b) 30 Beav. 280.

(c) V. C. K. — not reported.

(d) 2 Sm. & Gif. 157.

(e) 16 Ves. 239.

THE LORD JUSTICE KNIGHT BRUCE.—A common administration decree has been made concerning the estate of a deceased gentleman, under which decree all his creditors are entitled to come and prove their debts, and are in some sense bound to do so, for after such a decree no person can sue the executors, either at law or in equity, for a debt due from the deceased, without the leave of the Court, which is granted only in special circumstances. The appellant has gone into the Judge's Chambers and made a claim, supporting it by *prima facie* evidence of the existence of a debt, evidence not contradicted, not displaced, not met. It is considered, however, to be doubtful whether that evidence alone is sufficient to establish the debt. The claimant therefore applies for an order directing the executors to make an affidavit as to their possession of documents which may throw light on his claim, not of documents relating to the suit or the subject of the suit generally. I think that he is entitled to have such an affidavit made, and that considerable injustice might be done if the rule of the Court were not so. I think that he is clearly entitled to an order, not perhaps in the terms of the notice of motion, but as his counsel limited it. With respect to the costs, the Lord Chancellor not having expressed any opinion upon the merits of the case, I conceive that the direction given in Chambers as to costs, and also the order made in Court as to costs, should be discharged, and that all the costs incurred by the appellant to this time, except perhaps the costs before the Lord Chancellor, should be added to the debt claimed.

* 406 * THE LORD JUSTICE TURNER.—I am of the same opinion.

A decree for the administration of an estate under the old practice would have contained a direction for the production of documents as the Master should direct.¹ It is said that under this direction the Master would not have ordered the production of documents on the application of a creditor coming in to prove his debt; but, assuming this to be so, the question does not now stand as it stood under the old practice, for not only is the discretion which was formerly vested in the Master now transferred to the Judge, but the discretion is to be exercised under different circumstances. In exercising it, regard must now be had to the

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1176 *et seq.*, 1209, and note (2).
[814]

present state of the law, and to the effect of the Act 25 & 26 Vict. c. 42, requiring the Court not to send parties to law, but finally to adjudicate on the rights of claimants. The position of this case is that a creditor having come in to prove his debt, and the executors having, as it is alleged, documents in their hands which would establish the debt, it is contended that the Court ought not to require the executors to produce those documents; in effect that the Court must try the case in the absence of evidence which, if produced, might at once establish the claim. No doubt the Judge has a discretion, and there may be cases where the Court would refuse production; but having regard to the present state of the law, I think that a strong case would be needed to induce the Court to refuse it, for the refusal would evidently place the Court in great difficulty, as it would have to try the case without having full materials before it. It has been argued that the summons goes too far, and extends to all documents relating to the estate; but that the summons goes too far is no reason why the Court should decline to make a proper order upon it. It has also been urged that * there is no proof that the executors have * 407 any documents bearing on the appellant's claim; but how is a creditor to know whether executors have such documents or not? I think therefore that an order ought to be made directing the executors to file an affidavit as to documents bearing on the appellant's case. My only doubt has been as to the jurisdiction of the Court to compel an affidavit to be made; but looking at the provisions of the Act 15 & 16 Vict. c. 86, at the old practice of the Court, and the practice as to ordering documents to be handed over by solicitors upon oath, I think that the Court has authority to compel such an affidavit. I think that the appellant's costs, except those before the Lord Chancellor, should be added to his debt.

Some discussion took place as to the form of the order, which was ultimately drawn up as follows:—

“ That the plaintiff F. M'Veagh and the defendants J. Croall, D. Croall, and R. Croall do, within ten days after service of this order, make and file a full and sufficient affidavit or full and sufficient affidavits, stating whether the said plaintiff and the defendants hath or have had in her, his, or their possession or power

any, and (if any) what documents relating to the claim therein of the said Francis Schwenk Gilbert, and accounting for the same." Directions for production and inspection.—*Reg. Lib.* 1863, *B.* 501.

* 408 * SNOWDON *v.* THE METROPOLITAN RAILWAY COMPANY.

1863. February 21. Before the Lord Chancellor Lord WESTBURY.

An appeal lies directly from an order of the Judge in Chambers as to production of documents before a decree is made where the Judge makes the order in person and declines to adjourn the matter into Court to be argued by Counsel.¹

THIS was an application for a direction to the registrar to receive and enter an appeal directly from the refusal of the Vice-Chancellor STUART in Chambers to make an order for production of documents mentioned in the affidavit of the defendant.

The decision which it was sought to make the subject of appeal had been made by the Vice-Chancellor in person, but attended only by the solicitors of the parties, and his Honor had refused to permit an adjournment into Court for argument by counsel.

Mr. Cracknall, in support of the application. — The case differs from that of *In re M'Veagh's Estate*, (a) in this respect, that the decision here in question was made upon a summons taken out before decree, whilst there the decision was made upon the application of a creditor who had gone in under a decree; but the registrar, thinking that the case cited governed this, declined to receive and enter the present appeal. The difference between the cases is essential. The present is a case in which, under the practice of the Court as existing before the alterations effected by the Master in Chancery Abolition Act (15 & 16 Vict. c. 80), the application and the order would have been made in Court, with a consequent right of appeal. That right has not been taken away by the Act, which does nothing more than substitute the

(a) *Supra*, p. 399.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1474.

jurisdiction of the Judge at Chambers * for that of the * 409 Judge in Court, and the order at Chambers for the order in Court; and it consequently still exists.

He referred to *Ridgway v. Newstead*. (a)

The Lord Chancellor directed the appeal to be received and entered, remarking upon the difference between the present case and that of *In re M'Veagh's Estate*, and the inexpediency of interfering with the discretion of the Judges at Chambers by the allowance of appeals in cases circumstanced as that was.

CLARK v. LEACH.

1863. January 28, 30. Before the Lord Chancellor Lord WESTBURY.

Where a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contract. And where one of the articles of a partnership for a term provided that either partner might, in the event of specified conduct on the part of the other, dissolve the partnership by notice, and that the latter partner should, in that event, be considered as quitting the business for the benefit of the former, this article was held not properly applicable to a continuation of the partnership after the expiration of the term without any agreement for renewal.¹

THIS was an appeal by the plaintiff from a decree of the Master of the Rolls declaring that a partnership carried on by the plaintiff and the defendant stood dissolved from the 30th of June, 1862, and directing accounts of the partnership, as a partnership at will, upon the footing of such declaration.

The case before his Honor is reported in the 32d volume of Mr. Beavan's Reports, (b) where the facts are fully stated. The following statement of them is sufficient for the present purpose.

(a) 4 De G. & J. 15.

(b) Page 14.

¹ See 2 Lindley Partn. (3d Eng. ed.) 871; *Bradley v. Chamberlin*, 16 Vt. 613; *Miffin v. Smith*, 17 Serg. & R. 165; *United States Bank v. Binney*, 5 Mass. 176, 185; *Dickinson v. Bold*, 3 Desaus. 501; *Collyer Partn.* (5th Am. ed.) §§ 214, 310; *Parsons v. Hayward*, 4 De G., F. & J. 474.

By an indenture dated the 17th of July, 1839, and made
* 410 between the defendant of the one part and the * plaintiff
of the other part, they agreed to be and continue partners
as merchants, ship insurance, custom-house and general agents,
for seven years from the 1st of July, 1839, if they should so long
live, subject to the provisions thereafter contained for determin-
ing the partnership.

These provisions, so far as they are material to the present case,
were expressed in the following terms: —

“ If, contrary to the several agreements hereinbefore contained,
either of the said partners shall neglect or refuse to attend the
business of the said partnership, . . . then . . . the other of
the said partners, if he shall think fit, shall be at liberty to
dissolve the said partnership, by giving to the partner who shall
offend in any of the particulars aforesaid, or leaving in the prem-
ises where the said partnership business shall be carried on, a
notice in writing declaring the said partnership to be dissolved and
determined, and the said partnership shall, from the time of giving
or leaving such notice or from any other time to be therein speci-
fied for the purpose, absolutely cease and determine accordingly,
without prejudice nevertheless to the remedies of the respective
partners for the breach or non-performance of all or any of the
covenants and conditions contained in these presents at any time
before the determination of the said partnership; and the said
partner to whom the said notice shall be given shall be considered
as quitting the said business for the benefit of the partner who
shall give the said notice, and both the said partners shall join in
causing a proper notice of the dissolution of the said partnership
to be inserted in the London Gazette; and in case the offending
partner shall refuse to join in inserting such notice of dissolution,
the other partner shall be at liberty to cause such notice to
* 411 be inserted in the London Gazette and such public * papers,
and give such other notice of dissolution as he in his sole
discretion may think fit, and without any concurrence of the
offending partner, whose name, however, he hereby authorizes the
other partner to affix to any such notice or notices if he think fit.”

After the expiration of the partnership term in 1846, the busi-
ness was carried on by the partners as before, without express

renewal of the partnership articles, until the 30th of June, 1862, on which day the plaintiff, referring the defendant to the partnership articles, and charging him with continued neglect to attend to the business of the partnership, caused a written notice of dissolution to be served upon him, at the same time expressing his desire to exercise an option given by the articles, in the case of a determination of the partnership by such notice as was then being given, of purchasing the defendant's share of and in the partnership property, credits and effects at a valuation.

The defendant, in the course of a voluminous correspondence which ensued, disputed the right of the plaintiff to give such notices, but expressed his willingness to acquiesce in an immediate dissolution on the usual terms of the assets being realized and divided between the parties.

The bill was filed for a declaration of the dissolution of the partnership as from the 30th of June, 1862; for a liquidation, if necessary, of the partnership affairs on the terms of a certain letter of the 19th of July, 1862, to which the plaintiff alleged that the defendant had acceded; and for an injunction to restrain the defendant from acting, as the bill alleged he was doing, in contravention of the rights claimed by the plaintiff on the footing of the partnership articles, and particularly of * that clause * 412 of them under which the plaintiff had assumed to give the notices of the 30th of June, 1862, being still binding upon the partners, notwithstanding that the partnership term of years, to which those articles originally had reference, had long since expired.

The Master of the Rolls, being of opinion that the clause had no longer any application, declined to grant the injunction sought, and made the decree now under appeal.

Mr. Selwyn and *Mr. Druce*, for the appellant, citing *Churton v. Douglas*, (a) and *Burrows v. Foster*, (b) contended that he was entitled to the relief sought by his bill. It was well settled that in the case of a partnership by deed continued by the partners after the expiration of the original partnership without a new agreement, all the old covenants were infused into the new relation, with the single exception of the covenant for duration.

(a) Johns. 174.

(b) Before the Lords Justices, 8 May, 1862; Reg. Lib. 1862, A. 941.

Booth v. Parks, (a) *King v. Chuck*, (b) *Essex v. Essex*, (c) *Parsons v. Hayward*. (d) And such being the general rule, and the particular clause in the partnership articles in the present case, under which the plaintiff had assumed to give the notices of the 30th of June, 1862, being one which it was for the common benefit of the parties to have considered as transferred to the new contract after the expiration of the original partnership term, *Featherstonhaugh v. Fenwick*, (e) it must be considered as forming part of the new agreement.

Mr. Baggallay and *Mr. Knox Wigram*, for the respondent, * argued that the relation between the parties after the expiration of the original partnership term was that of partners at will, a relation which could be determined at any moment without the necessity of previous stipulations on the subject of dissolution. The particular clause in question, which indeed was the foundation of the plaintiff's case, would therefore be insensible, if imported from the old into the new relation between the parties. Moreover, so far from being a beneficial clause, it was one in the nature of a clause of forfeiture, and, therefore, if for no other reason, to be held applicable only to the particular state of circumstances to which it was made applicable, namely, the original partnership.

Mr. Druce replied.

THE LORD CHANCELLOR. — This is a question of some importance upon the general point, how far special provisions in a written contract of partnership shall be assumed to have been transferred to a new partnership when the term of the original partnership has expired and the partners have continued the business without express renewal of the partnership articles.

The plaintiff and the defendant became partners as merchants and agents in 1839. Probably they were then new to one another. They entered into a partnership for seven years, and it seemed desirable to have special stipulations in the partnership articles

(a) 1 Molloy, 465.

(c) 20 Beav. 442, 450.

(b) 17 Beav. :25.

(d) 31 Beav. 199; S. C. on appeal, 33 L. J. N. S. Ch. 670.

(e) 17 Ves. 298.

for the purpose of insuring a great amount of personal attention to business on the part of each partner. They were probably aware that, being bound together for a term of years, if either partner had reason to complain of want * of sedulous * 414 attention to business on the part of the other; his remedy must be sought in a Court of Equity; and they thought it convenient to insert in the articles a provision which should obviate the necessity of coming here for a dissolution. Accordingly this provision was inserted in the articles: [His Lordship read the provision, which is set out above.]

In 1846 the original term came to an end, and these gentlemen having mutual confidence in each other allowed their partnership to continue without renewing the articles. The question is, What in that case is the presumption of law?

Ordinarily a contract for a term constituted by a written agreement must be considered as having come to an end at the expiration of the period for which it was entered into; and the contract during the term differs from that which arises from the continuance of the relation by the mutual *consensus* of the parties after the term has expired. The one is to last for a certain term; the other only for so long a time as they both shall choose. Am I then by any principle of law bound to assume or justified in assuming that all the special articles and conditions in the original written deed of partnership for a term are at once transferred by law to this new contract, which has no particular limit to the term of its duration? That would be a very strong and extravagant assumption, and one that is not warranted by any principle or authority. All that has been said on the subject is that you assume the partners to continue on the same general footing as before; but in the case of a stipulation so special and extraordinary as that in this deed, whereby one of the partners is to have the power not only of ending the partnership, but of gaining a benefit by so ending it, I think I should be taking up * a position unwarranted by any principle and not supported by any authority, were I to hold that such a special provision as this was transferred to the new contract, which in point of duration and *vinculum* of the contract was a contract wholly different. * 415

And there is also good reason for holding that this particular stipulation in the written agreement is gone after the expiration of the term, from the fact that the new contract being for no spec-

ified time, but determinable at the will of either party, the power to determine the partnership is not wanted.

And again, it is a general rule in this Court that provisions in the nature of provisions of forfeiture can only be imported into a contract so far as they have been the subject of a clear unmistakable stipulation; and I cannot take this particular clause, which I consider to have been pertinent to the original contract, as having been repeated and renewed by the parties, and forming part of the terms of the new partnership. I should be going beyond due bounds were I to do so, and I am of opinion that it was not an implied term of the new partnership.

That being so, it is unnecessary to advert to the remaining points in the case, other than that urged by *Mr. Druce*, who has argued the case with great ability, that it was for the mutual benefit of the parties that this stipulation should be considered as transferred to the new contract, and that it must therefore be considered a proper accompaniment of the agreement. But such a clause is not ordinarily found in contracts of partnership, and I cannot on that ground say that it ought to be imported into the new contract. It

might be very well for these gentlemen when first com-
 * 416 mencing their business * relations to submit themselves to the operation of such a clause, and yet that it might be no longer necessary when their mutual confidence in one another had become so strong that they continued those relations after the expiration of the original partnership without the shackles of a new agreement. I consider their conduct in so doing a repudiation of this special stipulation, even were I inclined to hold that by law I was obliged to hold it imported into the new contract between them.

An argument in favour of the plaintiff's view of the case was attempted to be drawn from the correspondence between the parties, but I do not think that the correspondence supports the argument.

His Lordship, after remarking that his decision would not prejudice a further question which had been argued at the bar as to the rights of the late partners *inter se* in the good-will of the partnership business, and with respect to which question *Wedderburn v. Wedderburn* (a) and *Austen v. Boys* (b) had been referred to, affirmed the decision of the Master of the Rolls, and dismissed the appeal with costs.

(a) 22 Beav. 84.

(b) 2 De G. & J. 626.

*In the Matter of CHARLES ROWLEY, a Person of *417
Unsound Mind ;

AND

In the Matter of THE TRUSTEE ACT, 1850.

1863. January 16. Before the LORDS JUSTICES.

A mortgage debt having been paid off, the committees of the estate of the mortgagee, who had become lunatic, presented a petition, which they served upon the mortgagor, for an order enabling them to reconvey the mortgaged property. The costs of the mortgagor's appearance were directed to be paid by the petitioners and allowed to them out of the estate, with an intimation that for the future petitions of the kind ought not to be served upon mortgagors.¹

THIS was a petition by the committees of the estate of a mortgagee who had become lunatic, praying that they might be appointed to reconvey the mortgaged properties freed from the mortgage debts, which had been paid off, and that the deeds might be delivered up ; and praying also that the petitioners might be at liberty to retain and pay the costs of themselves and all parties of and incidental to the application as between solicitor and client out of any moneys coming to their hands on account of the estate of the lunatic, and be allowed the same on passing their accounts before the Master.

The petition, which to save expense extended to several mortgages, was served upon the Crown, there being no next of kin, and upon the mortgagors, or persons otherwise interested in the equities of redemption of the mortgaged properties.

Mr. De Gex, for the petitioners.

Mr. Wickens, for the Crown.

Mr. Speed, for John Ward, one of the mortgagors, who alone of the respondents, other than the Crown, appeared, consented to the order, and asked for his costs out of the estate, citing *In re Wheeler*. (a)

(a) 1 De G., M. & G. 434.

¹ See *In re Phillips*, L. R. 4 Ch. Ap. 629.

* 418 * Their Lordships directed the mortgagor's costs to be paid by the petitioners and allowed to them out of the estate, but intimated their opinion that in future mortgagors ought not to be served with petitions like the present.

HART v. TRIBE.

1863. March 19. Before the LORDS JUSTICES.

A testator bequeathed to his wife 4000*l.* to be used for her own and the children's benefit as she should think best, recommending her not to diminish the principal but vest it in government or freehold securities. There being two children, one adult and the other a minor, the widow made an appointment of 500*l.* to the minor and of the residue to the adult; and she and the adult child petitioned for payment out of Court of the residue. *Held*, affirming a decision of the Master of the Rolls, that such payment could not be ordered.¹

THIS was an appeal from a decision of the Master of the Rolls refusing to make any order on a petition.

The question arose on the construction of a disposition contained in a codicil dated the 9th of March, 1851, to the will of Samuel Beazley the testator in the cause. The gift was as follows:—

“I hereby bequeath to my beloved wife Maria at Bettring House 4000*l.* out of the proceeds of these accounts, to be used for her own and the children's benefit as she shall in her judgment and conscience think best, being convinced that it will be disposed of conscientiously and properly by her for the purposes mentioned, at the same time recommending her not to diminish the principal, but vest it in government or freehold securities.”

It was ascertained in the cause that the petitioner Mariamne Dyte was the person spoken of in the will as “my wife Maria,” and that the testator by “the children” meant the petitioner Emily Ann Beazley and Frederick Beazley Hart.

¹ See *Whiting v. Whiting*, 4 Gray, 240; *Chase v. Chase*, 2 Allen, 101; *Loring v. Loring*, 100 Mass. 340; *Lewin Trusts* (5th Eng. ed.), 104, 105; *Perry Trusts*, §§ 112, 620.

* In September, 1854, Mariamne Dyte intermarried with * 419 John Dyte, and previous to the marriage she executed a settlement, by which she appointed that after her own decease 500*l.*, part of the 4000*l.*, should belong to F. B. Hart if he attained twenty-one, and subject to that appointment that the 4000*l.* after her decease should belong to the petitioner Emily Ann Beazley; and by the same deed, to which John Dyte was a party, the income payable to Mariamne Dyte during her life was settled on her for her separate use without any restraint on anticipation.

Emily Ann Beazley having attained twenty-one and F. B. Hart being still a minor, Mrs. Dyte and Emily Ann Beazley presented a petition praying that the funds in which the 4000*l.* was invested might, after providing for the 500*l.* appointed to F. B. Hart, be transferred to Emily Ann Beazley, Mrs. Dyte being desirous of giving up her own life-interest in her favour. The Master of the Rolls having refused to make any order on the petition (*a*) the petitioners appealed.

Mr. Hobhouse and *Mr. Jenkinson*, for the appellants. — If Mrs. Dyte has a power of appointment among the children, Emily is entitled to all the fund except 500*l.* If she has not, Emily is entitled to one-half. *Crockett v. Crockett.* (*b*) There is nothing in the will which can prevent the parting with any portion of the capital during the widow's life. In no conceivable events could F. B. Hart be entitled to more than half the income; but the sound view as we contend is, that the widow has a power of dealing both with capital and income.

[*Thorp v. Owen* (*c*) and *Gully v. Cregoe* (*d*) were referred to.]

* *Mr. Martindale* and *Mr. F. T. White*, for the respon- * 420
dents, were not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — Wisely or unwisely, prudently or imprudently, this testator has, I think, used language rendering it impossible to touch any part of the principal of the fund during the life of the widow. The words of recommendation, taken in conjunction (as they must be) with the words preceding

(*a*) 32 Beav. 279.

(*c*) 2 Hare, 607.

(*b*) 2 Phill. 553.

(*d*) 24 Beav. 185.

them, appear to me to show an intention that the capital should remain untouched during her life, and I cannot agree to any order which will have the effect of touching it in her lifetime or of declaring the rights in it after her death.

THE LORD JUSTICE TURNER. — I am of the same opinion. The codicil declares that the fund is to be used for the benefit of the wife and the children as she shall think best, a declaration which applies both to capital and income. The decree has settled that the wife is entitled only for her life, (a) and that decree has not been appealed from. There is therefore a trust for the benefit of the wife and the children attaching during the life of the wife, and any power she may have of dealing with the capital is subject to this trust. I agree, therefore, that we cannot put the fund in such a position as to take away from the wife the power of applying any part of the income for the benefit of the children if their necessities should require it.

* 421 * In the Matter of LADY CHARLOTTE SHERARD, a
Person of Unsound Mind ;

AND

In the Matter of THE TRUSTEE ACT, 1850 ;

AND

In the Matter of THE LUNACY REGULATION ACT, 1853.

LOWTHER v. CUFFE.

1863. March 20, 21. Before the LORDS JUSTICES.

A decree having been made for partition of lands, an undivided share in which was vested in a lunatic as tenant in tail, an order was made in lunacy and in chancery directing the committee to execute all necessary assurances for giving effect to the partition.

THIS was a petition in lunacy and in chancery by the committee of the estate of Lady Charlotte Sherard, praying that the petitioner might be directed and authorized to make and execute such con-

(a) 18 Beav. 215 ; see also 19 Beav. 149.

veyance or conveyances and to take such admittance or admittances on behalf of Lady Charlotte Sherard as might be necessary or proper for carrying into effect a partition which had been decreed in a suit of *Lowther v. Cuffe*.

Under a will Lady Charlotte Sherard was entitled to an undivided fifth of the estates in question as tenant in tail. Under the same will and various disentailing assurances the plaintiffs and the defendants other than Lady Charlotte Sherard were entitled to the remaining four fifths. The decree directed a partition, and declared that upon its being made the plaintiffs and defendants respectively would be trustees within the meaning of the Trustee Act, 1850, of such of the lands to be partitioned as should be allotted in severalty to the others of them. The allotment having been made, the present petition was presented for the purpose of completing the partition by passing the legal estate, but a difficulty was felt as to whether, having regard to the fact of Lady Charlotte being tenant in tail, the order asked for could be made.

* *Mr. Osborne* and *Mr. Whitcombe*, for the petitioner, * 422 referred to the Trustee Act, 1850 (13 & 14 Vict. c. 60), §§ 3, 20, 30, and the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), §§ 124, 139, and *In re Bloomar*. (a)

Mr. Osborne Morgan, as *amicus Curiae*, referred to *Powell v. Matthews*. (b)

Mr. Bentinck, for the plaintiffs and the defendant Cuffe.

Their Lordships made an order as prayed.

Part of the devised estates had been taken by a railway company, and was represented by 1864*l.* 16*s.* 8*l.* per cent consolidated bank annuities. Upon the partition 128*l.* 6*s.* 10*d.*, part of this sum, had been allotted to Lady Charlotte Sherard.

The order made on the petition directed that the costs of the petitioner and the plaintiffs, and of the defendant Cuffe (who as one of the next of kin had obtained liberty to attend in the lunacy) of the application, and one-fifth of the costs of the petitioner and

(a) 2 De G. & J. 88.

(b) 1 Jur. N. S. 973.

the plaintiffs of the conveyance or conveyances and admittance or admittances to be made and taken in pursuance of the order, should be raised and paid out of the 128*l.* 6*s.* 10*d.* consols.

Reg. Lib. B. 1863, fol. 707.

* 423 * THE ATTORNEY-GENERAL *v.* THE TEWKESBURY
AND MALVERN RAILWAY COMPANY.

1863. April 16. Before the LORDS JUSTICES.

On the plans deposited by the promoters of a railway with the clerk of the peace, a bridge by which it was proposed to carry the line across a certain turnpike road was described as having a span of forty-five feet. *Held*, that under the 18th section of the Railway Clauses Consolidation Act, 1845, which enacts that where it is intended to carry the railway on an arch as marked on the plan, "the same shall be made accordingly," the company were bound to make an arch conformable to the description in the plan, and were not at liberty to build it with a span of only thirty-five feet.¹

Per the Lord Justice TURNER: The bridge was an "engineering work" within the meaning of the 14th section of the Railway Clauses Act, and the company were by that section debarred from making it otherwise than according to the description in the plan.

THIS was a motion by way of appeal by the defendants the Tewkesbury and Malvern Railway Company from an order of Vice-Chancellor STUART granting an injunction to restrain them from erecting a particular bridge with a span of less than forty-five feet.

The railway company was incorporated by "The Tewkesbury and Malvern Railway Act, 1860" (23 & 24 Vict. c. 72, local and personal) for making a railway from Ashchurch to Great Malvern. The Act contained the following recital, "Whereas plans and sections showing the lines and levels of the said intended railway with a book of reference to such plans, containing the names of the owners or reputed owners, lessees or reputed lessees and occupiers of the land proposed to be taken for the purposes of the said railway, have been deposited with the respective clerks of the

¹ See cases in note (1), to *Beardmer v. The London and North-Western Railway Co.*, 1 Mac. & G. 115.

peace," &c. ; and it enacted, that "The several Acts of Parliament following, that is to say, The Companies Clauses Consolidation Act, 1845, The Lands Clauses Consolidation Act, 1845, and The Railways Clauses Consolidation Act, 1845, shall, excepting in so far as they are expressly varied or altered by this Act, be incorporated with this Act."

* Sect. 28. "Subject to the powers and provisions in this * 424 and the Acts incorporated therewith contained the company may make and maintain the railway and works on the line and upon the lands delineated on the plans and described in the books of reference deposited as aforesaid and according to the levels defined on the said sections, and may enter upon, take and use such of the said lands as shall be necessary for such purpose."

The 13th, 14th and 49th sections of the Railways Clauses Consolidation Act provide as follows : —

Sect. 13. "Where in any place it is intended to carry the railway on an arch or arches or other viaduct as marked on the said plan or section the same shall be made accordingly ; and where a tunnel is marked in the said plan or section as intended to be made at any place the same shall be made accordingly, unless the owners, lessees and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be so made."

Sect. 14. "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits and under the following conditions (that is to say) : " — then follow certain provisions, none of them applicable to an arch or viaduct.

Sect. 49. "Every bridge to be erected for the purpose of carrying the railway over any road shall (except where otherwise provided by the special Act) be built in conformity with the following regulations, that is to say: The width of the arch shall be such as to leave thereunder a clear space of not less than thirty-five feet if the arch be over a turnpike road," &c.

* The line of this railway as laid down on the deposited * 425. plan crossed the Tewkesbury and Cheltenham turnpike

road, and upon the plan were these words, describing the nature of the intended crossing: "Turnpike road to Cheltenham and arch forty-five feet span, sixteen feet high; level unaltered."

The company on proceeding with their works came to the determination to reduce the span of the arch to thirty-five feet.

An information and bill was consequently filed, one of the trustees of the Tewkesbury turnpike roads being relator and plaintiff, to restrain the company from making the bridge of less dimensions than those mentioned in the deposited plans, and Vice-Chancellor STUART granted an injunction accordingly. (a)

Mr. Bacon and *Mr. Dryden*, for the appellants. — Taking the case apart from the Railways Clauses Consolidation Act, the plans and sections are referred to by the special Act for the purpose merely of defining the line and levels of the proposed railway, and cannot be treated as incorporated with the Act for any other purpose. *The North British Railway Company v. Tod* (b) is precisely in point upon this, a similar question having arisen there upon an Act, the terms of which, so far as related to this point, were substantially the same. *Beardmer v. The London and North Western Railway Company* (c) and *The Queen v. The Caledonian Railway Company* (d) illustrates the same principle. Now as regards the

Railway Clauses Act, the Vice-Chancellor considered that * 426 in the 13th section "accordingly" meant "according to all the particulars given in the plans and sections;" we submit that it is neither grammatical nor reasonable to construe the word in this sense; the natural meaning of the word is, that at that place the railway shall be carried on an arch or arches or other viaduct, and this is the view taken of the sections in *Little v. The Newport, Abergavenny, and Hereford Railway Company*. (e) The 14th clause shows how far the deposited plans may be departed from as to engineering works. The Vice-Chancellor thought that this bridge was an "engineering work" within the meaning of this section, and that we could not vary it; but *The Queen v. The Caledonian Railway Company* (d) shows that the words "engineering works" do not include bridges; we are therefore thrown upon the 49th section, which allows us (except where otherwise provided by

(a) 4 Giff. 333.

(d) 16 Q. B. 19.

(b) 12 Cl. & Fin. 722.

(e) 12 C. B. 752.

(c) 1 Mac. & G. 112.

the special Act, which here is silent on the subject) to make the bridge in any way we please, provided the span be not less than thirty-five feet nor the height than sixteen feet. The 51st section clearly refers to the 49th as the one defining the width of bridges.

Mr. Malins and *Mr. F. C. J. Millar*, in support of the injunction. — We do not rely on the special Act but on the clauses of the general Act incorporated with it. “Accordingly” properly means “according to what is laid down in the plan,” and *Little v. The Newport, Abergavenny, and Hereford Railway Company* (a) decides nothing against us. It was not necessary there to decide whether “accordingly” meant any thing more than “at the place indicated in the plan;” but *Mr. Justice MAULE* states it to mean “in the manner and at the place” pointed out by * the plan. * 427 This is what the Vice-Chancellor has decided in the present case, and is both reasonable and consistent with the natural meaning of the words, “accordingly” referring to the whole of what is mentioned before. The bridge is clearly an engineering work, and a variation of it is forbidden by the 14th section. *The Queen v. The Caledonian Railway Company* (b) is inapplicable, the ground of decision there being, that the bridge was an accommodation work made for the use of adjoining proprietors, not a part of the works connected with the line and made for the purposes of the railway. It was not doubted either in that case or in *Beardmer v. The London and North Western Railway Company*, (c) that the plans would have been obligatory if the case had been within sections 13 or 14; but it was held that the works fell among those provided for by section 16. The 49th section was not intended to override any thing that went before, but merely to impose restrictions on the company as to the mode of doing certain works in case neither the special Act nor the provisions of the general Act defined the mode in which they were to be constructed.

Mr. Dryden, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — The deposited plan in the present case contains these words: “Turnpike road to Cheltenham, and arch forty-five feet span, sixteen feet high; level unaltered.”

(a) 12 C. B. 752. (b) 16 Q. B. 19. (c) 1 Mac. & G. 112.

It is impossible to contest that these are material statements, important representations with a view to those persons interested in the road who might have occasion to consult this plan, and who were in effect for their own protection * required to do so. The 13th section of the Railways Clauses Consolidation Act, which is incorporated in the particular Act in this case, enacts that "where in any place it is intended to carry the railway on any arch or arches or other viaduct as marked on the said plan or section, the same shall be made accordingly." The proper construction of the word "accordingly," as used in the 13th section of that Act, clearly in my judgment makes it necessary that the arch should be made conformably to the description contained in the words which I have read from the deposited plan, namely, "turnpike road to Cheltenham, and arch, forty-five feet span, sixteen feet high." What the company are desirous of doing is, to make that an arch of thirty-five feet span, which is there required to be of forty-five feet span. In my opinion their so doing would be a direct breach and infringement of the contract and enactment under which the bridge was to be made. I think the appeal, if not frivolous and vexatious, at least groundless, and one that ought to be dismissed with costs.

THE LORD JUSTICE TURNER. — Having looked at the authorities cited, I am satisfied that the order made by the Vice-Chancellor in this case is perfectly right. By the special Act authority is given to the company, subject to the powers and provisions of the special Act and the Acts incorporated therewith, "to make and maintain the railway and works on the line and upon the lands delineated on the plans and described in the books of reference deposited as aforesaid, and according to the levels defined on the said sections," leaving the particular mode of construction in all other respects undefined, except as it may be defined by the general Acts. If the case had rested upon the special Act alone without reference to the incorporated general * Acts, it certainly might have admitted of argument whether, consistently with the cases of *The North British Railway Company v. Tod*, (a) *Beardmer v. The London and North Western Railway Company* (b) and other cases of that class, the plan and the books of reference could

(a) 12 Cl. & Fin. 722.

(b) 1 Mac. & G. 112.

be treated as incorporated into the special Act for any further purpose than that of determining on what line, upon what lands, and according to what levels the railway was to be made. But how does the case stand upon the general Acts which are incorporated into the special Act? Undoubtedly the whole scheme of the Railways Clauses Consolidation Act proceeds upon a reference to the particular plans which have been deposited as mentioned in the special Act. The 13th section provides, that "where in any place it is intended to carry the railway on an arch or arches or other viaduct as marked on the said plan or section" (referring to the plan or section deposited with the clerk of the peace as mentioned in the special Act) "the same shall be made accordingly; and where a tunnel is marked on the said plan or section as intended to be made at any place, the same shall be made accordingly, unless the owners, lessees, and occupiers of the land in which the tunnel is intended to be made shall consent that the same shall not be so made." Now a question is raised upon the meaning of the word "accordingly," as used in this section. It has been urged that the case of *Little v. The Newport, Abergavenny, and Hereford Railway Company*, (a) has put a construction upon that word, and that the section according to that authority means no more than that an arch is to be made in the place in which by the plan it is described as intended to be made. No doubt the Court in that case construed the section as * requiring the * 430 arch to be made according to the plan as regarded situation, but I do not understand the case as deciding that the section did not require the arch to be made in other respects according to the plan. The Court held, that if the arch was laid down upon the plan as being to be made at a particular place, then at that particular place it must be made; but the Court did not say that, if it be laid down upon the plan as being to be made in a particular manner or of particular dimensions, the particular manner of making it or the particular dimensions need not be observed. On the contrary, the judges seem rather to have inclined to the opposite opinion. It is moreover to be observed, that if the argument which is brought forward on the part of the appellants in this case is to be maintained, no effect will be given to the words "as marked in the said plan or section," for it cannot be doubted what

the construction of the Act would have been if those words had been omitted. The construction must then have been that the place only was referred to, for the Act would then have stood thus: "Where in any place it is intended to carry the railway on an arch or arches or other viaduct, the same shall be made accordingly." The words "as marked on the said plan or section" cannot, therefore, refer merely and exclusively to the place, for they are not required for that purpose. They must, therefore, as I conceive, refer not only to the place, but to the manner in which the arch or arches or viaduct is or are to be made.

The case does not even rest there. In the 14th section of the Act it is provided, that "it shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels or other engineering works described in the said plan or section, except,"

&c., thus by reference incorporating the plan and section *431 as containing *a description according to which the engineering works must be made. To meet this it was said that Lord CAMPBELL in the case of *The Queen v. Caledonian Railway Company*, (a) decided that the words "engineering works" did not include bridges; but upon examining the case it will be found that he held directly the contrary, for the ground on which he rested his decision was that the section did not apply in that case because the works were not works upon the line of the railway, and the judgment contains a clear intimation of opinion that it does apply to bridges upon the line of the railway. What his Lordship says is this, — "Now in the present case the prosecutors seem at first to have thought that an obligation to make this bridge and road without deviation from the plans, except within certain limits, was imposed by section 14 of Statute 8 & 9 Vict. c. 20, because it was supposed to be an engineering work within that section. But it is quite clear that section 14 is applicable only to works on the line of railway itself" (thus clearly importing that in his opinion the words "engineering works" were applicable to all works upon the line of railway, including bridges), "and does not apply to collateral works, such as cross-roads or bridges for carrying them over the line." The ground, therefore, of the decision was, that the engineering works (including bridges under the term "engineering works") were not upon the line of

(a) 16 Q. B. 19.

railway, but were collateral to the line of railway for carrying other roads across it. So far then from that case supporting the construction contended for on the part of the appellants as to the 14th section of the Act of Parliament it is in direct opposition to it. It appears to me, therefore, that this bridge was an engineering work from the description * of which, as given * 482 in the plan, the company are by the 14th section forbidden to deviate.

Then remains the argument that by the 49th section the company are authorized to build their bridges in any way they think fit, provided they comply with the restrictions of that section. I am of opinion that the 49th section was intended only to impose restrictions upon the company as to the mode of building bridges, so far as the mode of building them was not defined by any special directions, either in the special Act or in the earlier provisions of the Railways Clauses Consolidation Act, and that it has not the effect of removing any restriction imposed by any such special directions.

I therefore entirely agree in the conclusion at which the Vice-Chancellor has arrived in this case, and am of opinion that this motion ought to be refused with costs.

1863. May 6, 7. Before the LORDS JUSTICES.

A young lady, entitled to a legacy of stock, was induced by the executors to execute a settlement, under which she and two trustees were to hold the stock upon trust for herself for life for her separate use, and after her death upon such trusts as she should by deed or will appoint, and in default of appointment upon trust for the persons who would have been entitled to it as her next of kin if she had died possessed of it intestate and without having been married, with a proviso that the trustees on her request in writing should join with her in disposing of all or any part of the fund as she might direct. The young lady executed this settlement without any professional advice and without having had any communication on the subject except with the executors. The stock was transferred by the executors directly into the joint names of herself and the two trustees. She married about two months

after. Upon her death her husband, as her administrator, filed a bill to set aside the settlement.

Held, that such a settlement made in such circumstances was not binding upon her, and that her administrator was entitled to have it set aside.¹

THIS was an appeal by the defendants from a decree of Vice-Chancellor STUART, setting aside a settlement made by the deceased wife of the plaintiff shortly before her marriage with him.

Under the will of Mrs. Child, who died in March, 1859, Mrs. Prideaux, then Miss Lonsdale, became entitled to a sum of 1101*l.* 18*s.* 6*d.*, 3*l.* per cent reduced bank annuities. The defendant Moulton and Christopher Lonsdale (Miss Lonsdale's uncle) who were the executors of Mrs. Child's will, advised her to have a settlement made, in order to prevent her brothers from troubling her for money. She acceded to this, and on the 30th of April, 1859, asked Moulton to have such a deed prepared. Moulton accordingly instructed Mr. Jennings, a solicitor, to prepare the draft of a settlement, and the draft was prepared and settled by counsel; but there was no direct communication between Miss Lonsdale and the solicitor, who received his instructions from Moulton only, and it did not appear that Miss Lonsdale, whose father was dead, conferred with any one but Moulton as to the nature of the instrument. The settlement was executed on the

11th of May, 1859, at Moulton's office, he being the attest-
 * 434 ing witness. It recited * that Miss Lonsdale had transferred the 1101*l.* 18*s.* 6*d.* bank annuities into the names of herself, R. E. Lonsdale, and R. M. Mills; and it was declared that they should stand possessed of the fund and the income thereof, upon trust to permit her during her life to receive the dividends or pay them to her for her separate use, and after her death upon such trusts as she should by deed or will appoint; and in default of appointment, upon trust for such persons as at her decease would have become entitled thereto under the Statutes of Distribution if she had died possessed thereof intestate and without having been married. The deed contained a proviso that, notwithstanding the trusts aforesaid, the trustees on the request in writing of Miss Lonsdale whether *coverte* or *sole* should join with her in transferring or disposing of all or any part of the trust fund as she should direct.

¹ See *Kerr F. & M.* (1st Am. ed.) 189, 190; *Perry Trusts*, § 194; *Adams's Eq.* (5th Am. ed.) [183], 365, note (2), and cases cited.

The recital that Miss Lonsdale had transferred the stock into the joint names of herself and the two trustees was not correct, the fact being, that it had, on the 27th of April, 1859, been transferred directly into their joint names, by Mrs. Child's executors, without ever having been under the control of Miss Lonsdale. The deed was retained by Moulton, but the stock receipt was given to Miss Lonsdale.

At the time when this deed was executed Miss Lonsdale was engaged to be married to the plaintiff, of which fact, however, Moulton deposed that he was not aware. The marriage was solemnized on the 16th of July, 1859.

In October, 1859, the plaintiff went to the Bank of England to receive a dividend on the stock, and his attention was then first called to the fact that the stock was not standing in his wife's sole name. Mrs. Prideaux * in the following month * 435 called upon Mr. Yetts, who had for some years been the solicitor of herself and her mother, and said she wished to consult him about making her will, as she wished to leave the fund to her husband. Mr. Yetts, speaking under the impression that there was no settlement, informed her that a married woman could not make a will, and that stock belonging to her would on her death go to her husband. He then asked whether there was a settlement, and was informed that she had signed some document prepared by Moulton. Mr. Yetts then told her that he could not advise her further without seeing the document, and recommended her to borrow it from Moulton, which she promised to do. Not hearing from her again, he, as he deposed, went to Moulton and mentioned the substance of the conversation; Moulton replied that he had not seen Mrs. Prideaux, and did not offer to produce the settlement. Moulton in his evidence denied all recollection of this interview, and said that he should not have made the least objection to producing the deed.

No further step appeared to have been taken in the matter, and on the 30th of January, 1862, Mrs. Prideaux died intestate and without issue.

Shortly after the death of Mrs. Prideaux the plaintiff called on Moulton and asked to see the settlement. Moulton informed him that he had delivered it to R. E. Lonsdale, who had placed it in the custody of Mr. Jennings. The plaintiff then went with Moul-

ton to Mr. Jennings's office and heard the deed read over, and shortly afterwards Mr. Jennings furnished him with a copy.

The next of kin declining to give up their claim under * 436 the deed, the plaintiff on the 13th of March, 1862, as * administrator of his wife, filed his bill against the trustees and the next of kin, praying that the deed might be cancelled and given up to him, and the stock transferred into his name. Moulton was subsequently made a party by amendment. The bill alleged that the settlement was invalid as being a fraud on the plaintiff's marital right, and also, that it was executed by Miss Lonsdale under the influence of Miss Child's executors without her having any legal advice, though Moulton well knew that Mr. Yetts was generally acting for Miss Lonsdale as her solicitor.

Vice-Chancellor STUART made a decree that the settlement should be cancelled and given up to the plaintiff, and that the defendants should pay the costs of the suit. (a) The defendants appealed.

Mr. Bacon and *Mr. Batten*, for the plaintiff, in support of the decree. — This settlement is one which clearly cannot be upheld. It is not only a fraud on the marital rights of the plaintiff: *Goddard v. Snow*; (b) but it was executed by the lady without proper advice, and is of such a nature that, having regard to the want of advice, it cannot be considered as binding on her.

Mr. Malins and *Mr. Cracknall*, for the defendants. — This settlement cannot be set aside as a fraud on the marital right. To be liable to be set aside on that ground, a deed must have been kept secret from the husband. *Loader v. Clark*. (c) That case shows that if the husband after becoming aware of the settlement allows matters to remain as they are he will be taken to have * 437 ratified the settlement, and that it is enough to put * him on inquiry that he is aware of the transfer of the property, though he may not be actually aware of the nature of the trusts. If he has notice that the property has been in some way dealt, with, and he makes no inquiry he is bound by what has been

(a) 4 Giff. 159.

(c) 2 Mac. & G. 382.

(b) 1 Russ. 485.

done. *Wrigley v. Swainson*, (a) *England v. Downes*. (b) The plaintiffs rely on *Goddard v. Snow*, (c) which is the strongest case, but there concealment was relied upon; and *St. George v. Wake*, (d) shows that it is essential.

Then as regards the second point, we say that the two cases made by the bill are inconsistent and conflicting. One is a case made by the husband against the wife, the other is a case by the wife against the trustees of the settlement. The bill alleges undue influence, but it is not proved; and it does not allege that the wife did not understand what she was doing. It was a most proper instrument, except that there is a slip in the form of the limitation to her next of kin, which, considering the extensive powers of disposition reserved to her, is not of material importance. The instrument is altogether one which a well advised person in the circumstances in which this lady was placed might well have executed. It is most harsh to make the trustees pay costs; adverse claims were made to the fund, and if they had filed a bill they would have had costs as a matter of course. As against Mr. Moulton the bill ought to have been dismissed with costs. There was no object in bringing him here except to ask costs against him, and even had he been a solicitor he could not properly have been made a party for that purpose, there being no case of fraud. *Le Texier v. Margravine of Anspach*, (e) *Marshall v. Sladden*. (g) The Vice-Chancellor laid stress * 488 upon his keeping the settlement and never giving the plaintiff a copy. But what obligation could there possibly be upon him to give a copy when it was not asked for? It is no ground of imputation upon a person that he does not volunteer information. *Mangles v. Dixon*. (h) Moulton evidently acted entirely with a view of benefiting the lady, and ought not, we submit, to be punished in this way even if the Court should hold that he did not exercise a sound discretion.

Mr. Bacon, in reply on the question of costs only. — The trustees have not held an even hand, but fought the case of the next of kin, and the costs ought to follow the result. Moulton is the

(a) 3 De G. & Sm. 458.

(b) 2 Beav. 522.

(c) 1 Russ. 485.

(d) 1 M. & K. 610.

(e) 15 Ves. 159.

(g) 7 Hare. 428.

(h) 3 H. L. Cas. 702.

author of the whole mischief, and was properly made liable to the costs of repairing the damage he had done.

THE LORD JUSTICE KNIGHT BRUCE. — The evidence in this cause, and the expressions to be found in some of the authorities, are such as in my opinion to render it neither necessary nor desirable to decide for or against the plaintiff so far as his case is founded on the allegation of fraud on the intended marriage, or on his prospective marital rights. I therefore purposely pass over this part of the controversy, thinking that according to the just interpretation of the bill the plaintiff's title to relief is there put not upon that ground alone, but also on another independent ground. I am of opinion, upon the allegations and the evidence, that, however good the motive may have been, it was an act of impropriety —

I do not say of fraud — I do not say of intentional unfairness — to deal with the legacy * given to this lady in the way in which it was dealt with. It ought not to have been transferred by the executors, as it was transferred, directly to the trustees of the settlement, it ought to have been transferred directly to the lady herself, leaving her to exercise an unfettered judgment as to the mode in which it should afterwards be dealt with. That, however, is not all, the fund was transferred directly to trustees for the purposes of a settlement, which it is impossible to suppose that the lady understood, which was not properly prepared either in form or substance, which it was not reasonable or prudent for her to execute, and against which she ought to have been advised and cautioned. She was not so advised or cautioned, but was induced to execute it by persons under whose influence she was as regarded money matters. They consulted a solicitor and counsel, but she had no interview with either, and had no communication with any one but Mr. Moulton upon the subject. In these circumstances she was induced to subject her property to trusts to which it ought never to have been subjected. I think, therefore, that if the bill had rested the case on this ground only the plaintiff as his wife's administrator would have had a clear title to relief. The settlement in my judgment is good for nothing, and has rightly been so treated by the Vice-Chancellor. As however this was a family transaction in which there is no ground for imputing to the defendants dishonesty or wrong intention I do not like fixing them with the costs; but it is not in my opinion a case

for giving costs to Mr. Moulton or to the trustees, who ought not to have accepted such a trust in such a state of circumstances.

THE LORD JUSTICE TURNER. — I am of the same opinion, and for the same reasons.

1863. May 7. Before the LORDS JUSTICES.

A defendant, against whom a decree for an account was made, had before decree made full discovery by answer as to documents in his possession. *Held*, nevertheless, that the plaintiff after decree was entitled to call for an affidavit as to his possession of any documents other than those mentioned in his answer relating to the matters in question.

THIS was a motion by the plaintiff to discharge an order of Vice-Chancellor STUART, refusing an application that the defendants Kitton and Ayliff might be directed to file an affidavit as to documents in their possession.

The bill was filed to establish the right of the plaintiff to a share of the profits of business done for a railway company by the parties to the suit, or some of them, as solicitors. Kitton and Ayliff were interrogated as to the possession of documents, and by their several answers they admitted the possession of documents, which they scheduled. No exception was taken to either of their answers.

On the 2d of June, 1862, Vice-Chancellor STUART made a decree, which was varied on a rehearing before the Lord Chancellor on the 24th of November, 1862. The decree declared the plaintiff entitled to a certain share of the profits of the business transacted for the company during the period therein mentioned, and directed an account of the profits.

On the 10th of February, 1863, the plaintiff applied to the Vice-Chancellor in Chambers for an order upon Kitton and Ayliff to file the common affidavit as to documents in their possession relating to the matters in question in the cause. This application having been refused with costs, the petitioner gave notice of motion that the Order of the 10th of February, 1863, might be discharged,

and that the defendants Kitton and Ayliff might be ordered
 * 441 within seven days after service of the * order to be made
 on the motion to make and file a full and sufficient affidavit,
 stating whether they or either of them had or had had in their or
 either of their possession or power any and what documents
 (other than those mentioned in their respective answers filed in
 the cause) relating to the matters in question in such cause, and
 particularly any diaries or memorandum books from and inclusive
 of the year 1852 to the 16th of April, 1859, and accounting for
 the same. The notice went on to ask for the usual directions as
 to production at the office of the defendants' solicitors, and for
 liberty to the plaintiff to inspect.

The Vice-Chancellor refused this motion with costs, and it was
 now renewed by way of appeal before the Lords Justices.

Mr. Malins and *Mr. H. F. Shebbeare*, for the plaintiff, in support
 of the motion. — In taking the partnership account the plaintiff is
 clearly entitled to the production of documents in possession of
 the defendants relating to the matters in question; and they may
 have obtained the possession of fresh papers since they put in
 their answers. If they have, they ought to produce them; if they
 have not, they have nothing to do but to say so, and their resist-
 ance is vexatious. Under the old practice, an order for production
 would have been of course, under the usual directions inserted in the
 decree. The direction for production of papers is not now inserted,
 because it is considered that the Judge in Chambers has jurisdic-
 tion to order production without any thing being said about it in
 the decree. Seton Decrees. (a) The practice before and after decree
 is now assimilated by the General Orders: Seton Decrees, (b)
 * 442 and cases there cited. Though the defendants * have been
 interrogated as to documents, an order for the usual affida-
 vit may be made at any stage of the cause. *Manby v. Bewicke*, (c)
Rochdale Canal Company v. King, (d) *Mansell v. Feeney*, (e)
Rumbold v. Forteach, (g) *In re M'Veagh's Estate*. (h)

Mr. Bacon and *Mr. Bird*, for the defendants. — We do not dis-

(a) Page 50 (3d ed.).

(e) 2 J. & H. 320.

(b) 1052 (3d ed.).

(g) 3 K. & J. 44.

(c) 27 Law T. 45, V. C. W.

(h) *Ante*, p. 399.

(d) 15 Beav. 11.

pute that the fact of the defendants having been interrogated as to documents does not exempt them from making an affidavit; but we submit that where a full and sufficient answer to the interrogatory has been put in, the defendants ought not to be ordered, as a matter of course, to make an affidavit where, as is the case here, no special grounds are shown. In *The Rochdale Canal Company v. King*, (a) there had not been any answer; in *Rumbold v. Forteath*, (b) there was no schedule, and the cases go no further than this, that where the defendant has not by answer given a full discovery as to documents he will be ordered to file an affidavit.

Mr. Malins, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I am of opinion that the defendants ought to be ordered to make the affidavit.

THE LORD JUSTICE TURNER. — I am of the same opinion. I think that the orders of the Vice-Chancellor ought to be discharged, and an order made in the terms of the notice of motion.

*MACINTOSH v. THE GREAT WESTERN RAILWAY * 443
COMPANY.

1863. May 22, 25, 26. Before the LORDS JUSTICES.

An inquiry having been directed what was due from the defendants to the plaintiff for work done and materials supplied under several contracts, the chief clerk by his certificate simply stated the amounts which he found to be due on the several contracts, without giving any further particulars or stating any grounds for his conclusion. *Held*, that the certificate ought to have been in such a form as to enable the Court to decide whether a correct result had been arrived at, and it was accordingly discharged without prejudice to any question.¹

THIS was an appeal motion by the defendants the Great Western Railway Company, the object of which was to discharge a certificate made by the chief clerk of Vice-Chancellor STUART.

(a) 15 Beav. 11.

(b) 3 K. & J. 44.

¹ See *post*, 450, note (1).

The bill was filed in 1847 for an account of what was due to the plaintiff for work done and materials supplied by him in the construction of the defendants' railway. (a) On the 30th of May, 1855, (b) Vice-Chancellor STUART made a decree directing the following inquiry:—

“An inquiry whether any thing and what remains due to the plaintiff in respect of the works executed and the materials supplied or otherwise under the several contracts in the pleadings of this cause mentioned, having regard to the terms of the said contracts respectively and to the circumstances under which the plaintiff carried on and executed the said works.”

The chief clerk by his certificate dated 19th February, 1863, certified that there was due to the plaintiff in respect of the works executed and the materials supplied or otherwise under the several contracts in the pleadings mentioned, having regard to the terms of the contracts and to the circumstances under which the plaintiff carried on and executed the works, the sum of * 444 * 147,598*l.* 10*s.* 1*d.*, and that the particulars of that sum were set forth in the first schedule to his certificate, and that the evidence adduced upon the inquiry consisted of the evidence mentioned in the decree, and also of the evidence mentioned and set forth in the second schedule to the certificate.

The first schedule was as follows:—

	£	s.	d.
The contract described as 3 L	9,958	0	8
Interest thereon from the 4th of June, 1838, when the company had possession, to the 18th February, 1863, at the rate of 4 <i>l.</i> per cent., deducting income tax	9,487	8	11
The contract described as 3 B	22,184	7	8
The contract described as 3 B extension	25,565	13	0
The contract described as 6 B	8,457	1	3
The contract described as Fox's wood filling	1,942	7	10
The contract known as 3 B and 3 B extension ballasting	788	1	5
The contract described as 3 B completion	9,647	3	7
Interest as aforesaid on 68,585 <i>l.</i> 4 <i>s.</i> , being the total of the last-mentioned contracts from the 31st day of August, 1840, when the defendants had possession, to the time aforesaid	59,507	15	9
	<hr/>		
	£147,598	10	1

(a) 2 Mac. & G. 74.

(b) 3 Sm. & Giff. 146.

The second schedule specified a number of affidavits, and concluded with "and the several exhibits mentioned or referred to in the aforesaid affidavits and depositions respectively, and also several of the documents mentioned or referred to in the schedules to the answers of the said defendants, and in the schedules to the several affidavits of the plaintiff David Macintosh filed on the 7th day of April, 1853, and of William Wood, filed 10th of April, 1861."

Both the plaintiff and the defendants were dissatisfied * with this certificate and moved to discharge or vary it. * 445 The Vice-Chancellor refused both motions, and ordered the costs to be costs in the cause. The company now renewed their application by way of appeal.

Mr. Bacon, Mr. Malins, and Mr. T. Stevens, for the appellants. — A certificate in this form cannot be sustained. It does not give the slightest indication of the grounds on which the chief clerk proceeded; we cannot tell how the sum found due is made up; what the chief clerk has allowed or what he has disallowed. Even if he had made gross arithmetical blunders we could not detect them. The Court has no means of judging whether he has gone upon a correct principle or not, and the right of appeal is thus taken away. According to the old practice the Master's report would have stated the grounds on which he came to his conclusion; and the Act 15 & 16 Vict. c. 80, § 83 *et seq.*, contains nothing to alter the practice in this respect. *Morgan's Chanc. Prac.* (a) The certificate does not comply with Consolidated Order XXXV., rule 47. The principle of the old cases that a report must be made in such a form that the opinion of the Court can be taken upon it governs the present. *Kilbee v. Sneyd*, (b) *Dick v. Milligan*. (c) If a chief clerk may make a certificate in this form he is constituted an arbitrator, an office to which the Court has no jurisdiction to appoint him. As an instance of the way in which a certificate in this form works, the plaintiff has made a large claim for compensation on account of the unexpected hardness of the strata; it is clear from *Ranger v. Great Western Railway Company*, (d) that such a claim is untenable, but for

(a) Page 148 (3d ed.).

(b) 2 Moll. 186, 194.

(c) 2 Ves. Jr. 23.

(d) 5 H. L. Cas. 72.

- * 446 any thing we know to * the contrary the chief clerk may have allowed it to its full amount.

The Solicitor-General (Sir R. PALMER), *Mr. Bazalgette*, and *Mr. F. C. J. Millar*, for the plaintiff. — This case is not within the General Orders. The rules 46, 47 of Order XXXV. apply only to accounts directed against accounting parties, such as trustees or executors, as appears plainly from the 38d rule. They have reference only to suits in the nature of administration suits. Here the plaintiff had to make out his own demand; the defendants were not accounting parties who had to bring in an account and verify it upon oath; the plaintiff had to bring in his claim and prove it. What has been directed is not in substance any more than in terms an account; it is an inquiry, and the only proper answer to it is the statement of a lump sum. If the plaintiff had brought such a claim into Chambers in an administration suit, the chief clerk, according to the settled practice, would not have annexed to his certificate a schedule of accounts showing how the amount found due was made up, but would simply have stated the amount. The case is of every-day occurrence, where a person claims in an administration suit to be a creditor of the testator for a sum made up of a number of items for work done or goods supplied. The demand is properly a mere common-law demand, and was brought into equity only because, owing to the improper refusal of the engineer to certify, the plaintiff could not bring an action, and the principles relating to accounts against accounting parties cannot be applicable. What has been done is tantamount to what would have been done at law if an action could have been brought. 17 & 18 Vict. c. 125, §§ 3, 4, 5, 6. The Vice-Chancellor stated from the first that it was his intention, in making the decree in the form he did, to have a lump

* 447 sum found, and so preclude all * further discussion; yet the defendants have submitted to the decree for seven years.

Mr. Bacon, in reply. — Even at common law a reference could not have been made which would have the effect of an arbitration, except by consent of the parties. *Robson v. Lees.* (a) No answer

(a) 7 Jur. (N. S.) 244, Exch.

has been given to the argument that the certificate must be in such a form that the opinion of the Court can be taken upon it.

THE LORD JUSTICE KNIGHT BRUCE.—In this case it appears to me that the appellants, without any negligence or fault on their part, have been left without knowledge or information what some at least of the particular points among the numerous questions involved in the inquiry directed by the decree of the 30th of May, 1855 (an inquiry including, if not wholly consisting, of matters of account), upon which the opinion of the Vice-Chancellor's chief clerk, and that of the Vice-Chancellor himself, must have been against them, are—and also without knowledge or information what were the grounds of his Honor's opinion as to not a few of the points decided against the appellants. It seems to me, therefore, that we ought not to consider as satisfactory the certificate made under the decree, and being the subject of the Order of the 16th of April, both now under appeal, which order and the certificate should, in my judgment, both be discharged without prejudice to any question. The costs in the Vice-Chancellor's Court and here should, I think, be costs in the cause.

If on either side there shall be vexatious or litigious * conduct in the Vice-Chancellor's Chambers, the Court, * 448 especially having regard to what has already taken place there, will know how to deal with it. The time already occupied in this cause, instituted in the year 1847, the decree in which was made in the year 1855, to whatsoever circumstances attributable, and whatsoever the volume or complexity of the controversy, seems not less than shocking.

THE LORD JUSTICE TURNER.—I am of the same opinion. I am not sure that the perplexity in which we now find this case is not, in some degree at least, owing to the frame of the decree, which seems to have been framed with a view to arriving at the justice of the case by some short method of proceeding differing from the ordinary course of the Court. So far as my experience extends, justice is more speedily and safely arrived at by following the ordinary course and practice of the Court, than by attempting to reach it by some shorter method. A departure from the ordinary course generally, I think, leads to confusion. We are not however called

upon now to consider that point, the question not being before us, whether the decree might not have been more aptly worded.

It is said that the decree was framed with the intention that a lump sum should be given, and that a certificate finding a lump sum to be due satisfies the requirements of the decree and is correct in point of form. In a sense, no doubt, this is true; for an inquiry what is due must necessarily be answered by finding a lump sum. But the inquiry directed by the decree obviously raises these questions: What were the works executed? what were the materials supplied? under what circumstances were the

* 449 works executed? what moneys accrued due in respect * of the works and materials? and what moneys were paid on account? These questions must be answered before arriving at a conclusion as to the amount remaining due, and it is impossible to judge whether the result is accurate without knowing how they are answered. The question, as it appears to me, is not whether the finding a lump sum satisfies the terms of the inquiry, but whether it was enough for the chief clerk to find that a certain amount was due without so framing his certificate as to put the Court in a position to decide whether he had arrived at a correct conclusion. This certificate is not in such a form as to enable the Court to ascertain in what way the amount found due was arrived at, and I agree with my learned brother, therefore, that the certificate ought to be discharged, of course without prejudice.

It was argued, that, according to the common course of practice in an administration suit, the chief clerk, in ascertaining what is due to a tradesman who comes in to prove for the amount of his bill, consisting of numerous items, does not take an account in the same way as if an account had been directed of the dealings between the testator and the tradesman, but only certifies the amount which he finds to be due. I do not wish to disturb any settled practice in cases of that nature, but I am of opinion that if a case of that kind was brought before the Court on motion to vary the certificate, and the Court found that it could not ascertain which of the items in the bill had been allowed and which disallowed, the matter would be referred back to Chambers, that it might be shown on which of the items the dispute turned. Under the old practice, in all cases of account against executors or trustees, it was required that the accounts should be given in a

schedule to the Master's Report * In *Smith v. Smith*, (a) * 450 the Master, in taking the accounts of the personal estate of the testator in the cause, instead of appending the accounts in a schedule to his report, entered them in a book in his office, as is done in the case of the accounts of a receiver. The clerk of reports refused to file the report because no schedule was attached to it, and the Court decided that the accounts must be added. One of the objections taken to the report was, that in the absence of schedules it could not be excepted to, for that the exceptions must refer to items in the account.¹

It was urged that this case is not within the General Orders, for that they apply only to accounts directed against executors and trustees; but if the case is not within the orders, it must be governed by the general practice of the Court which prevailed before the passing of the Chancery Amendment Act, and according to that practice a Master's Report must have been in such a form that the judgment of the Court could be taken upon it. It is, therefore, immaterial whether the case is within the orders or not.

As to the course which ought to be taken in Chambers, all that I can say is, that the chief clerk must show by his certificate what sums he has allowed and what sums he has disallowed; for until that is known the Court cannot determine any thing. What will be the best mode of framing the certificate, whether it will be best to take the account as brought in by the plaintiff, specifying the items, or to classify the items, stating which are allowed and which are disallowed, giving reasons, it is impossible to say without

(a) Dick. 789.

¹ When a report is made upon accounts exhibited to the Master, such accounts should accompany the report, that the Court may see the correctness of the Master's inferences. *Jeffreys v. Yarborough*, 2 Hawks, 307; see *Mitchell v. Walker*, 2 Ired. Ch. 621. The Master should state the account at length, and all the facts found by him, so that they will be intelligible without reference to the testimony. *Herrick v. Belknap*, 27 Vt. 673. He should state what items were allowed, and what disallowed. *Reed v. Jones*, 15 Wisc. 40. His report should so present the items that exceptions may be taken to it. *Ransom v. Davis*, 18 How. (U. S.) 295. It should contain a succinct statement of all the points made by counsel, and the facts found by him upon such points. *Herrick v. Belknap*, 27 Vt. 673. The report of a Master, stating the accounts of a mercantile firm, should show whether the partnership resulted in a profit or loss, and to what extent, and should also dispose of the uncollected dues. *Zimmerman v. Huber*, 29 Ala. 379.

knowing the details of the account, but I have no doubt that the chief clerk will so frame his certificate that the matter may be brought before the Court in the most convenient way.

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* WALMSLEY v. FOXHALL.

1863. June 2. Before the LORDS JUSTICES.

A decree declared A. and B. to be entitled for their lives as tenants in common, with cross remainders between them. Upon the death of A., which took place more than five years after the decree, one of the parties entitled in remainder applied for leave to appeal against the declaration as to cross remainders. *Held*, that as the proper time for deciding whether there were cross remainders had not arrived when the decree was made, leave to appeal ought to be granted.¹

THIS was a petition for leave to present a petition of rehearing after the expiration of five years from the time of making the decree.

Edward Foxhall, the testator in the cause, died in 1815, having made his will, the general scope of which was that, after bequeathing various legacies to his six children and other persons, he gave his residuary estate in trust to pay the income to the testator's wife for her life, and after her death to divide the income among his said children in equal proportions, share and share alike, during their respective natural lives, and after the decease of all the children upon trust for the testator's grandchildren in equal shares. There was a proviso that in case of the death of any of the said children leaving issue, the respective legacies, share and interest of the child or children so dying should immediately become vested in his or their issue.

The testator left the six children named in his will surviving him, and all of them attained twenty-one. The testator's widow died in 1842, and Eleanor, one of the children, died in 1853, a spinster.

This suit having been instituted to carry into execution the trusts of the will, a decree was made on the 11th of November, 1854, by

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1476, and note (3).

which it was declared that, according to the true construction of the will, the surviving children of the testator were entitled to the whole income since the death of Eleanor, in equal shares for their lives, with cross remainders between them.

* Edward Martin Foxhall, another of the testator's chil- * 452
dren, died in December, 1862, leaving one child surviving
him. This child and her husband were the plaintiffs in the cause.

The plaintiffs were now desirous of having the words "with cross remainders between them" omitted from the decree, contending that, on the true construction of the will, Edward Martin Foxhall's share of the income did not go to the surviving children of the testator, but to E. M. Foxhall's own issue.

Mr. Hobhouse and *Mr. Nalder*, for the petitioners. — We submit that, although the ordinary time for appealing has elapsed, the special circumstances of this case will induce the Court to give leave to appeal. The decree was irregular in deciding a future right. The question could not be fairly argued at that time, for nobody could know how far he had any interest in opposing the making of the declaration now complained of.

Mr. Baggallay, *Mr. W. W. Cooper* and *Mr. Rasch*, appeared for different respondents. — In opposition to the application, it was contended that there were no special circumstances to take the case out of the operation of Consolidated Order XXXI., rule 1.

THE LORD JUSTICE TURNER. — I am of opinion that the intention of the order was to prevent questions which have been decided by the Court in the ordinary exercise of its jurisdiction from being unsettled by an appeal after five years, unless under special circumstances. In the present case there * has been a * 453
departure from the course of the Court by the insertion in the decree of a declaration as to future rights, and I think that leave to appeal ought to be given.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

In the Matter of THARP'S ESTATE.

1863. June 2. Before the LORDS JUSTICES.

A testatrix devised real estate to her nephews A., B., and C. for their respective lives, share and share alike, and after the death of each or any of them his share to go to his first and other sons successively in tail male, with remainder to his daughters as tenants in common in tail, and in default of such issue "to such of my said nephews as shall survive and to their and his issue in the manner hereinbefore mentioned; and in case of the death of all my said nephews and their issue, I devise my said estate to my right heirs."

A. died, leaving a son; B. died next, without issue; C. died last, leaving a son. *Held*, reversing the decision of the Court below, that B.'s share did not belong to C.'s son alone, but to A.'s son and C.'s son in moieties.¹

THIS was an appeal from a decision of Vice-Chancellor STUART on the construction of a will.

Eliza Mary Tharp, by will dated the 3d of August, 1830, devised to her trustees a plantation in Jamaica, with the slaves, cattle, stocks and plantation utensils thereon, being or thereunto belonging, upon trust that they should manage the estate, and after payment of all charges, "do and shall pay over the net proceeds to my nephews Thomas Newman, Esq., and Ben. Harding, Esq., the two eldest sons of my late brother Richard N. Harding Newman, and John Harding the son of my late brother John Harding, for and during the term of their respective natural lives, share and share alike, and to their respective assigns; and in case of

* 454 the death of *all, any or either of my said nephews, then that my said trustees shall pay the net proceeds, or their or his share thereof, unto the eldest son of such of my nephews lawfully begotten or to be begotten, and the heirs male of the body of such first son issuing; and in default of such issue shall pay the same to the second, third, fourth and all and every other son or sons of my said nephews lawfully begotten or to be begotten, severally and respectively, and in remainder one after the other as they shall severally be in priority of birth, and the heirs male of the body and bodies of all and every such son and sons issuing, the elder of such sons and the heirs male of his and their body and bodies being always preferred and to take before the younger

¹ See *Post*, 458, note.

of the said sons and the heirs male of his and their body and bodies issuing; and for want and in default of such issue, to pay the same to the daughter or daughters of my said nephews, share and share alike, and to the heirs of their bodies lawfully begotten, always giving a preference to the males over the females; and in case of the death of any or either of my said nephews without lawful issue, male or female, then to pay over the net proceeds to such of my said nephews as shall survive, and to their and his issue in the manner hereinbefore mentioned; and in case of the death of all of my said nephews and their issue, then I give and devise my said estate to my right heirs for ever."

The testatrix died in 1831. Her three nephews Thomas Newman, Ben. Harding, and John Harding survived her.

Thomas Newman died in 1856, leaving Thomas Harding Newman his eldest son.

Ben. Harding died in September, 1859, without issue.

* John Harding died in 1862, leaving John George Harding his only son. * 455

In 1835 the compensation payable under 3 & 4 Will. 4, c. 73, for the slaves, amounting to 2272*l.* 18*s.* new 3*l.* per cent annuities, was transferred to the surviving trustee of the will. In 1861 his representative paid it into Court under the Trustee Relief Act. By an order made in June, 1861, one-third of the fund was transferred to Thomas Harding Newman; and it was ordered that the dividends on the remaining two-thirds should be paid to John Harding for life or until further order.

In 1863 John George Harding presented his petition, asking for payment of the remaining two-thirds to him, and Vice-Chancellor STUART on the 24th of April made an order as prayed, from which Thomas Harding Newman appealed.

Mr. Kekewich, for the appellant. — Where there is a gift over on the death of all the takers and failure of their issue, cross remainders will be implied. *Atkinson v. Barton*, (a) *Doe v. Webb*, (b) *Livesey v. Harding*, (c) *Taafe v. Conmee*, (d) *Jarman on Wills*. (e) But if the case be held to turn on the meaning of the word survive, this is a case where "survivor" will be read "other."

(a) 10 W. R. 281.

(d) 8 Jur. (N. S.) 919.

(b) 1 Taunt. 234.

(e) Vol. 2, ch. 42, p. 510 (3d ed.).

(c) 1 Russ. & Myl. 636.

Doe v. Wainwright, (a) *Cole v. Sewell*, (b) *Wilmot v. Wilmot*, (c) *Holland v. Allsop*, (d) *Smith v. Osborne*. (e)

* 456 * *Mr. Greene and Mr. Jones Bateman*, for the respondent.

— The language of the will takes this case out of the authorities referred to on the other side. There is no occasion to resort to implication here: any implied estate would arise only after the express limitation to survivors and their issue is exhausted, and that limitation we contend provides in express terms for the events which have happened. If the testator intended what we say he did, what more apt words could he have used to express his intention?

[THE LORD JUSTICE KNIGHT BRUCE. — Suppose the nephew who died without issue to have outlived the others, how do you say that the estate would have gone?]

Probably the Court would in that case have implied a limitation, which would carry the estate to the issue of the others; but that would not interfere with any of the express limitations. The word “survivors” is not used here, but a verb defining exactly the class which is to take, and there is no instance of the word “survive” having been taken in any but its proper meaning. The general rule applicable to the present case is laid down by Lord CRANWORTH in *Gundry v. Pinniger* (g) and by the Lord Justice KNIGHT BRUCE in *Bird v. Luckie*, (h) to adhere as far as possible to the natural meaning of a testator’s language, and not to depart from it on a mere conjecture, however probable, that it does not express his intentions. There is no case of cross remainders being implied so as to interfere with any cross remainders expressly limited: *Clache’s Case*, (i) and in *Atkinson v. Barton*, (k) the Lord Justice TURNER says, “I take the general principle upon which the implication of cross remainders is founded to be,

* 457 that the Court upon examining the will finds that there * has been some omission, and it therefore introduces by implica-

(a) 5 Term R. 427.

(b) 4 Dru. & War. 33; 2 H. L. Cas. 186, 227.

(c) 8 Ves. 10.

(h) 8 Hare, 301.

(d) 29 Beav. 498.

(i) Dyer, 330 b.

(e) 6 H. L. Cas. 375.

(k) 10 W. R. 281.

(g) 1 De G., M. & G. 502.

tion such estates as are necessary to supply the omission, having regard in so doing to the manifest intention of the testator appearing by his will." *Wollen v. Andrewes* (a) shows that cross remainders cannot be implied where the property is given to the survivors, and *Winterton v. Crawford* (b) contains an intimation of an opinion to the same effect. *Lee v. Stone* (c) shows the strong tendency of the Courts now to construe "survivor" in its proper sense, and the word cannot be otherwise interpreted on mere speculation as to what the testatrix meant. It is true that she did not mean the estate to go over till all the stocks were exhausted; but that cannot control clear language as to the mode of division between the stocks.

Mr. Kekewich, in reply. — In none of the cases cited on the other side was there a gift over as here, except in *Winterton v. Crawford*, and in that case there was no decision on the point for which it is cited, but there are some observations which are in my favour. It is quibbling to make any difference between "survivors or survivor" and "such as shall survive," the two expressions being precisely equivalent. The gift over of the estate as a whole must either cause cross remainders to be implied or require "survivors" to be construed "others."

THE LORD JUSTICE KNIGHT BRUCE. — In this will, if the testatrix, instead of using the words "such of my said nephews as shall survive," had used the words "the survivors or survivor of my said * nephews," there would, the context being duly con- * 458 sidered, have been an ample amount of direct authority, as well as reason and principle, in favour of the conclusion for which the appellant contends. There can probably be no substantial distinction between the two expressions to which I have referred. But whether such a distinction cannot or can be drawn, there occurs at the end of the disposition this clause: "and in case of the death of all of my said nephews and their issue, then I give and devise my said estate to my right heirs for ever." It appears to me, both on authority and principle, that the testatrix has expressed in sufficiently clear terms an intention in favour of the conclusion for which the appellant contends.

(a) 2 Bing. 127.

(b) 1 Russ. & Myl. 407.

(c) 1 Exch. 674.

THE LORD JUSTICE TURNER. — I am of the same opinion. It is settled that in a will containing such limitations as are contained in this will, the words "survivors or survivor of my said nephews," if they had occurred in the place of the words "such of my said nephews as shall survive," would have been construed to mean "others or other of my said nephews," in order to effectuate the intention to be collected from the whole of the will. There is no more difficulty in construing "such as shall survive" to mean "others or other" than in so construing the words "survivors or survivor;" and in my opinion the series of decisions which settle that these latter words would in a case like the present have been so construed, obliges us to hold that the share of a nephew dying without issue goes over by express limitation to the other nephews and their issue.¹ The question as to the implication of cross remainders therefore does not arise.

1863. June 3, 4. Before the LORDS JUSTICES.

A testator bequeathed his residuary personal estate to his daughter. The daughter survived him several years, and bequeathed her residuary estate to her six children. One of her sons, who owed the testator 1400*l.*, became bankrupt some time after her death. It had been ascertained before the bankruptcy that the testator's estate yielded a clear residue exclusive of the 1400*l.* *Held*, that the executors of the daughter were entitled to retain the 1400*l.* out of the son's share in his mother's estate.²

THE question in this case was, whether the assignees in bankruptcy of Walter Stanton Bousfield were entitled to require one-sixth of the estate of his deceased mother Mrs. Bousfield who was the residuary legatee of William Knott, to be paid to them for the benefit of his creditors, leaving the executors of William Knott to prove against the estate of the bankrupt for a debt due from the bankrupt to William Knott, or whether the debt was, under the

¹ See *Badger v. Gregory*, L. R. 8 Eq. 78; *In re Keep's Will*, 32 Beav. 122; *Hodge v. Foot*, 34 Beav. 349; *Hurry v. Morgan*, L. R. 3 Eq. 162; *Browne v. Rainsford*, Ir. Rep. 1 Eq. 384, 392.

² See *Stammers v. Elliott*, L. R. 3 Ch. Ap. 195; S. C. L. R. 4 Eq. 675.

circumstances mentioned below, to be set off against the bankrupt's share of his mother's estate.

Mr. Knott died in December, 1858, leaving Mrs. Eliza Read Bousfield, his only child and sole residuary legatee. Thomas Bridge Simpson, Thomas Pewtress, and George Bousfield, the husband of Eliza Read Bousfield, were his executors. Walter Stanton Bousfield owed Mr. Knott 1400*l.* on a promissory note dated 1st September, 1851. Mr. George Bousfield died in March, 1859, upon which Mrs. Bousfield became entitled, as residuary legatee of her father, to all such parts of her father's residuary estate as had not been reduced into possession by her husband. She died in February, 1860, leaving a will, by which she gave her residuary personalty equally among her six children, of whom Walter Stanton Bousfield was one.

Suits were instituted for the administration of the respective estates of Mr. Knott, Mr. Bousfield, and Mrs. Bousfield, various questions having arisen as to *what was properly *460 attributable to the estates respectively. In May, 1861, an agreement for compromise of the suits was entered into, the 22d. clause of which was as follows:—

“That as to the debt (if any) due from the defendant Walter Stanton Bousfield to the estate of the said William Knott, declare in like manner that the same forms part of the residuary estate of the said Eliza Read Bousfield, and is to be held and applied by the executors of the said William Knott for the benefit of the parties entitled to her residuary estate; and in the mean time, until the said Walter Stanton Bousfield can make any arrangement with the parties interested therein for the settlement or relinquishment of their claim, let the executors of the said William Knott be absolved from taking any proceedings for the recovery of the said debt, except at the request and on the indemnity and for the benefit of any of the residuary legatees of Mrs. Bousfield who may require such proceedings to be taken; this present arrangement being without prejudice to any defence the said Walter Stanton Bousfield may have to any such claim under the Statute of Limitations or otherwise.”

Some of the parties to the suits being under disability, an application was made to the Court to confirm the agreement, and on

the 1st of June, 1861, an order was made directing an inquiry whether the proposed compromise was beneficial to the parties under disability. On the 20th of July, 1861, Walter Stanton Bousfield became bankrupt, which raised the question now under discussion. On the 20th of January, 1862, a certificate was made, approving of the compromise. A petition was then presented to confirm it, and on the 8th of March, 1862, an order was made confirming it, with certain variations which had been proposed subsequently to the bankruptcy. The order contained a

* 461 clause in * words substantially the same as those of the clause of the agreement above set out, but followed by the words "and also without prejudice to any question of set-off or retainer in respect of the said debt between the parties interested in the estate of the said testatrix Eliza Read Bousfield on the one hand, and the said assignees of the said Walter Stanton Bousfield on the other hand."

A special case was now presented to obtain the opinion of the Court on the question whether the right of set-off existed. It was stated in the case that there was a clear residue of Mr. Knott's estate exclusive of the 1400*l.*, and also a clear residue of Mrs. Bousfield's estate exclusive of that sum, though it was not stated in terms that at the time when the agreement was entered into it was an ascertained fact that such was the case.

The Master of the Rolls decided in favour of the right of set-off, holding the point to be settled by the agreement and order for compromise, which his Honor decided to be binding on the assignees. (a)

The assignees appealed from this decision.

Mr. Hobhouse and *Mr. Swanston*, for the appellants.—We contend, that as between a debtor and the residuary legatee of the creditor, there cannot be any right of set-off, as long as the estate is unliquidated. Though there may be a set-off after the accounts have been taken, and it has been ascertained that there is a clear residue coming to the residuary legatee, it is, we submit, impossible to hold that there can be any before that time. There

* 462 is an absence of cross demands, for the residuary * legatee has no right to sue the debtor, except in a case of collusion

between the executor and the debtor. *Elmslie v. M Anlay*. (a) The authorities are against the right of set-off. *Bishop v. Church*, (b) *Whitaker v. Rush*, (c) *Medlicot v. Bowes*, (d) *Freeman v. Lomas*, (e) *Lambarde v. Older*. (g) The case is to be tried by the rule in *Cherry v. Boulton*, (h) whether a right to receive and a liability to pay were ever co-existent in the same person. *Bell v. Bell* (i) applies the same rule. Here Mrs. Bousfield never had a right to receive the debt, for her receipt would not have been a good discharge: the executor only could give one. If, where a debt is due to A.'s estate, and the ultimate residue of that estate is to form an item in B.'s estate, there can while A.'s estate is wholly unliquidated be a set-off in favour of B., there is no reason why a similar right may not exist in favour of B.'s residuary legatee, and again in favour of the residuary legatee of that residuary legatee, and so on for any number of steps; and thus all the mischiefs would be introduced which are pointed out by Lord HARDWICKE in *Bishop v. Church*. The only case in which a security forming part of the estate of a testator has been held so vested in a residuary legatee as to give a right of set-off in respect of sums paid by the debtor to him is *Jones v. Mossop*, (k) where that conclusion was arrived at with difficulty, and under very special circumstances, there having been a time during which Richard Reed was legal owner of the bond, as well as equitable owner of the residue, of which the bond debt formed part, so that there was that co-existence of right and liability in the same person, which * was wanting * 463 in *Cherry v. Boulton*. In the present case there was at the time of the agreement for compromise nothing like a liquidated estate, there were suits pending which might have diminished the estate so as to leave no residue at all. The dealings of Knott's executors must have been with Mrs. Bousfield's executors, not with her residuary legatees. No concluded agreement can be considered to have existed till the order was made, and up to that time, apart from the bankruptcy, the executors of Mrs. Bousfield were bound to pay to W. S. Bousfield his share of the residue, while the executors of Mr. Knott were the persons entitled to

(a) 3 Bro. C. C. 624.

(b) 3 Atk. 691.

(c) Amb. 407.

(d) 1 Ves. Sen. 207.

(e) 9 Hare, 109.

(g) 17 Beav. 542.

(h) 4 My. & Cr. 442.

(i) 17 Sim. 127.

(k) 3 Hare, 568.

receive the debt. The agreement, if not varied by the order, would have bound the assignees; but it was materially varied, and the assignees only assented to the order on the terms of the questions of set-off being left open.

Mr. Baggallay (*Mr. F. Webb* with him), for the residuary legatees of *Mrs. Bousfield*. — In *Cherry v. Boulton*, the bankruptcy took place before the death of the testator, so that at his death he had nothing but a right to prove, and that was all which passed to his executors, not a right to receive the debt. Here *Mrs. Bousfield* had an equitable title to the debt, the statements of the case showing that *Mr. Knott's* estate, omitting this debt, was sufficient to leave a clear residue. [He was here stopped by the Court.]

Mr. Swanston, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — Independently of the agreement and order, and on the assumption that the agreement and order ought to be viewed and treated as *Mr. Hobhouse* and * 464 *Mr. Swanston* * say they ought, I am of opinion that the claim of the assignees is groundless. The other facts stated in the special case appear to me to establish the proposition that the testatrix had become in her lifetime the owner in equity of the debt in question for her own use. It was due from one of her residuary legatees, who has since her death become bankrupt, and he now by his assignees (who can claim by no better title than he if not bankrupt could have done) seeks to retain that portion of the assets and receive the same share of the residue as if no debt had been owing from him. I am of opinion that there is no principle nor authority for such a contention; and, therefore, not on the recital in the agreement nor on the order, but on the merits of the case, independently of the agreement and the order, it appears to me, I repeat, that the claim of the assignees is wholly unfounded.

THE LORD JUSTICE TURNER. — I think that upon the statements of the special case it must be taken to have been known and ascertained before the bankruptcy of *Walter Stanton Bousfield* that there was a clear residue of *William Knott's* estate exclusive of the 1400*l.* Assuming this to have been known and admitted, I feel no doubt that there was a right of set-off or retainer, by what-

ever name it ought to be called, a right in effect on the part of Mrs. Bousfield's executors to deduct the 1400*l.* from the share of her estate to which Walter Stanton Bousfield became entitled. I therefore concur in the conclusion of my learned brother.

* In the Matter of the Estate of THOMAS WOOD, deceased. * 465

DAVIDSON *v.* WOOD.

1863. June 4. Before the LORDS JUSTICES.

Proof allowed against the estate of a testator for money advanced to his wife during his lunacy, and applied by her in payment of her necessary expenses, though she had a separate income.

THIS was a motion by the executors of Thomas Wood, the testator in the cause, by way of appeal from an order of Vice-Chancellor Wood, admitting a proof for sums supplied to the testator's wife during his lunacy.

The testator on the 8th of September, 1859, was placed in a lunatic asylum. He had previously retired from business on account of the failure of his health; he had an income of about 120*l.* a year, and his wife had a separate income of about 107*l.* under the will of her first husband. In February, 1860, the testator was found lunatic by inquisition, the lunacy being found to date from the 1st of August, 1858. On the occasion of his being removed to the asylum, his wife took a house in the immediate neighbourhood, and removed to it the furniture of the house in which she and her husband had resided. The expenses of the removal, including the expense of taking her husband to the asylum and a medical fee, amounted to 20*l.* 6*s.* 6*d.* The Lords Justices appointed her the committee of the person of the lunatic, and his own income was expended upon himself. There being for a time some hindrance in the way of her obtaining payment of her separate income, she borrowed from Mr. Hardwick different sums amounting altogether to 135*l.*, which were advanced to her as follows: 7th of September, 1859, 10*l.*; 12th of October, 20*l.*; 19th of October, 50*l.*; 17th of January, 1860, 35*l.*; 21st of May, 15*l.*;

2d of October, 5*l*. These sums were applied by Mrs. Wood * 466 in payment of the above 20*l*. 6*s*. 6*d*., * and for the maintenance of herself and her domestic establishment. The lunatic died on the 9th of November, 1861.

This suit having been instituted by summons for the administration of the lunatic's estate, Mr. Hardwick took in a claim for this 135*l*., which was opposed by the executors, and the case having been adjourned into Court, Vice-Chancellor Wood decided that the proof ought to be admitted. The executors appealed.

Mr. Caldecott, for the appeal motion. — The respondent's claim is made on the authority of *Jenner v. Morris*, (*a*) a decision, the authority of which I do not dispute, but I contend that it does not rule the present case. The question here is, whether a wife living separate from her husband, and having a separate income sufficient for her support, is entitled to pledge her husband's credit. The authority of a wife to pledge her husband's credit arises from the contract of marriage, but is not co-extensive with it; the question is one of agency, and the separate income must be taken into consideration in determining whether such an agency exists. *Clifford v. Laton*, (*b*) *Liddlow v. Wilmot*, (*c*) *Dixon v. Hurrell*, (*d*) *Johnson v. Sumner*. (*e*)

[THE LORD JUSTICE TURNER. — Where there is a separation by mutual consent, may it not be inferred that there is an understanding that the wife shall live on her separate income?]

[THE LORD JUSTICE KNIGHT BRUCE. — Ought it, for any purpose material on the present occasion, to be considered that there was here any separation?]

Read v. Legard (*g*) shows that such a separation as * 467 existed here is to be regarded * as a separation by consent.

In *Johnson v. Sumner* the rule is laid down that the Court will look to all the circumstances to see whether the wife is constituted the husband's agent for the purpose of binding him by ordering necessaries. An application ought to have been made in proper time in the lunacy.

(*a*) 2 De G., F. & J. 45.

(*b*) 1 Moo. & M. 101.

(*c*) 2 Stark. 86.

(*d*) 8 Car. & P. 717.

(*e*) 3 H. & N. 261.

(*g*) 6 Exch. 636.

Mr. Marten, for the respondent, was not called upon.

THE LORD JUSTICE KNIGHT BRUCE. — On the cases at common law which have been cited I do not give any opinion. The amount of the income here on each side makes it, in my judgment, wholly unnecessary to do so. The husband and wife had between them an income amounting to less than 250*l.* per annum. The husband became lunatic; his own income was wholly applied for his benefit, and his wife was supplied with these small sums, which were applied in payment of her necessary expenses. The decision of the Vice-Chancellor appears to me clearly right; the appeal, in my judgment, is frivolous, and if the Lord Justice agrees, should be dismissed with costs.

THE LORD JUSTICE TURNER. — I entirely agree.

1863. June 4. Before the LORDS JUSTICES.

Where a case is made out, raising a reasonable suspicion that a defendant who has made an affidavit as to documents has in his possession other documents relating to the matters in question and not disclosed by the first affidavit, the Court may order him to make a further affidavit, although the first is sufficient in point of form.¹

A defendant who had filed an affidavit as to documents was ordered to file a further affidavit. After this order had been made, but before any further affidavit had been filed, he applied for an affidavit as to documents in the possession of the plaintiffs, the time for excepting to his answer having expired, and the plaintiffs were ordered to make such affidavit. *Semble*, that this order was correct.

THIS was a motion by the defendant to discharge an order of Vice-Chancellor STUART, directing him to make a further affidavit as to documents in his possession.

The bill was filed on the 11th of December, 1862, and on the 15th of January, 1863, the common order was made for the

¹ See *Wright v. Pitt*, L. R. 3 Ch. Ap. 809; 2 Dan. Ch. Pr. (4th Am. ed.) 1823, 1824, and cases in note (2).

defendant to file an affidavit as to documents in his possession "relating to the matters in question in this cause." On the 16th of February, the defendant filed an affidavit admitting the possession of the documents mentioned in the schedule thereto, and objecting to the production of those in the second part of the schedule on the ground of privilege. The affidavit concluded with a general traverse, "according to the best of my knowledge, remembrance, information, and belief I have not now and never have had in my own possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, or solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to

* 469 such matters * or any of them other than and except the documents set forth in the said schedule hereto."

The answer of the defendant, which was filed on the 23d of February, 1863, contained statements as to the defendant having taken a lease of a public-house and underlet it to one William Winson (the relations between whom and the defendant formed part of the case made by the bill), and as to his having subsequently proposed to grant Winson a lease of a farm. The defendant by his answer stated that he believed that some letters had passed between him and a Mr. Simpson with reference to such lease, but that he could not set forth as to his belief or otherwise the dates or contents of any of the letters. No documents relating to these transactions were mentioned in the schedule to the affidavit.

The plaintiffs took out a summons in Chambers returnable on the 17th of March, calling on the defendant for a further affidavit as to documents. This summons was adjourned into Court, and on the 16th of April, 1863, an order was made as follows:—

"The Court being of opinion that the said affidavit is insufficient, and the defendant by his counsel now applying for further time to file a full and sufficient affidavit, this Court doth order, that the defendant do within one fortnight after service of this order file a full and sufficient affidavit, pursuant to the order dated the 15th day of January, 1863, stating whether he has or

ever had and when last in his possession or power, or in the possession or power of his solicitors or agents, any and what letters, papers, writings, and documents, or letter, paper, writing or document relating to the purchase or sale of the public-house in the plaintiff's bill mentioned lately occupied by W. Winson in the said bill named, or the negotiations and arrangements for such * purchase or sale, or relating to the lease or pro- * 470 posed lease by the defendant to the said W. Winson of a farm close or near to, &c., or to the defendant's intention or wish or proposal to give any such lease, including letters, papers, writings, or documents to or from Mr. Simpson in the said bill mentioned, and accounting for the same." The order went on to give directions for production of the documents the possession of which should be admitted, except such as the defendant should object to produce.

The defendant now moved to discharge this order.

The plaintiffs also moved by way of appeal to discharge an order which the defendant had obtained, directing them to make an affidavit as to documents in their possession. This order was obtained on the 25th of April, 1863. On the 7th of May the plaintiffs moved before the Vice-Chancellor to discharge it on the ground that his Honor had held the defendant's affidavit as to documents to be insufficient, and that the defendant had no right to call on the plaintiffs for discovery of documents until he had made full discovery as to documents in his own possession. The Vice-Chancellor refused this motion with costs.

Mr. Osborne and Mr. Leonard Field, for the defendant. — First, as regards our own appeal motion. The principle on which the Court acts in these cases is laid down in *The Rochdale Canal Company v. King*. (a) The form of affidavit required by the Court is given in Morgan's Chanc. Prac.; (b) we have followed this form and we submit that the Court cannot go behind the * affidavit and oblige us to put in a fresh one upon a * 471 mere suspicion that the original one is not true. Under the old practice if an interrogatory as to documents was sufficiently answered the plaintiff might either amend his bill and interrogate more specifically as to the class of documents which

he supposed to have been omitted, or he might indict the defendant for perjury; there was no third course. The Vice-Chancellor held that we must give specific information as to specific documents. This is substantially cross-examining the defendant on his affidavit as to documents, which it has been decided cannot be done. *Manby v. Bewicke*. (a) The plaintiffs ought to amend if they consider this discovery material. *Lamb v. Orton* (b) shows that in a case of this nature the oath of the defendant is conclusive. *Richards v. Watkins*, (c) and *Willett v. Thistleton*, (d) appear against us, but are referable to special circumstances.

Then as to the appeal motion of the plaintiffs. The answer of the defendant was filed on the 23d of February, and no exceptions having been taken it had become sufficient before we applied for the Order of the 25th of April. In this state of circumstances the right to such an order is clear on the terms of the Act 15 & 16 Vict. c. 86, § 20, *Walker v. Kennedy*, (e) *Lafone v. Falkland Islands Company*. (g)

Mr. Bacon (*Mr. George Lake Russell* with him), for the plaintiffs. — It is admitted here that what we obtain by the Order of the 16th of April could be obtained by amending the * 472 * bill and interrogating upon the amendments. The spirit of the Act is, that production of documents should be obtained in a summary way, and it would be most inconsistent with that spirit to oblige us to resort to the machinery of amending and interrogating.

[In reply to a question from the Court, *Mr. Bacon* stated that he did not object to the omission of the declaration that the affidavit was insufficient. The Court then called on *Mr. Osborne* to reply upon the appeal motion of the defendant.]

Mr. Osborne, in reply.

THE LORD JUSTICE KNIGHT BRUCE. — I believe the Lord Justice agrees with me in the opinion that the plaintiffs ought not to be put to amend their bill in order to obtain from the defendant discovery as to his possession of documents relating to the matters

(a) 8 De G., M. & G. 470.

(b) 22 Law J. (Ch.) 713, V. C. K.

(c) 6 Jur. N. S. 168, V. C. W.

(d) 1 New R. 32, M. R.

(e) 3 Jur. N. S. 481, V. C. K.

(g) 2 K. & J. 276.

referred to in the Order of the 16th of April last; and that the order so far as it directs the defendant to make a further affidavit ought to be affirmed. We think, however, that it would have been better for that order not to have imputed insufficiency to the affidavit already made, and in this respect we think that the order should be varied.

THE LORD JUSTICE TURNER. — I do not see any thing in the 18th section of the Act to preclude the Court from requiring more than one affidavit as to documents. If, after an affidavit has been made, the Court sees any thing to raise a reasonable suspicion that the defendant has in his possession other documents relating to the matters in question, I think it * may re- * 473 quire him to make a further affidavit. In the present case there appears to me to be enough to raise a reasonable suspicion that the defendant has further documents which may help the plaintiffs to make out their case; and I think that the plaintiffs ought not to be put to amend their bill for the mere purpose of obtaining discovery as to such documents. The defendant will be in no worse position than if that course were taken, since he can by his affidavit object to the production of any documents which he may contend ought to be treated as privileged communications.

Mr. Bacon then abandoned his motion to discharge the Order of the 25th of April.

THE LORD JUSTICE KNIGHT BRUCE. — We are both of us inclined to think that order correct.

The order was drawn up in the following form : —

“That the said order dated the 16th day of April, 1863, be varied, and as varied be as follows :—

“That the defendant B. Noel do within one fortnight after service of this order file a full affidavit stating particularly whether he has or ever had,” &c.

The rest followed the terms of the original order. (a)

1863. April 15, 16, 18. June 27. Before the LORDS JUSTICES.

A father on the marriage of his son covenanted to give and bequeath by will to the son, or if he should die in the father's lifetime, leaving his wife surviving, then to the wife, the sum of 2500*l.*, to be held on the trusts of the settlement. The father died insolvent. *Held*, that the covenant was not to be construed as affecting only assets applicable to payment of legacies, but created a specialty debt against his estate.

The father by his will, reciting a power contained in his own marriage settlement of appointing a sum of 10,000*l.* among his children, which sum, in default of appointment, went to them equally, appointed 2500*l.* to the above-mentioned son "in full discharge" of the above covenant. About a year after the father's death this 2500*l.* was paid to the trustees of the son's marriage settlement by the son's direction, and several years afterwards he took from them an assignment of the benefit of the covenant. *Held*, that in the absence of evidence to show that the son directed the payment of the 2500*l.* to the trustees, with the intention of discharging the father's estate from its liability under the covenant, it was not so discharged.

THIS was an appeal in a suit instituted by a creditor of James Wickham the elder against his executors James Wickham (since deceased), John Wickham and Charles Wickham, and other parties, for the administration of his estate. The appeal was brought by one of the simple contract creditors of the testator who had come in under the decree, and it complained of an order made by the Master of the Rolls upon a motion to vary the chief clerk's certificate and upon the hearing of the cause for further consideration. By this order his Honor, so far as respected the motion, refused to vary the certificate, in so far as it found each of the defendants John Wickham and Charles Wickham to be a specialty creditor of the testator for the sum of 2500*l.*, but varied the certificate in certain respects, and among other things by striking out so much thereof as found the defendant John Wickham to be indebted to the testator's estate in the sum of 531*l.* 19*s.* 1*d.*, the defendant Charles Wickham to be so indebted in the sum of 137*l.* 4*s.* 8*d.* and the estate of the late defendant James Wickham to be also so indebted in the sum of 1440*l.* 0*s.* 8*d.* So far as re-

* 475 spected the further consideration, his Honor gave * directions for the distribution of the assets in conformity with what he had decided upon the motion.

The questions as to the rights of the defendants John Wickham and Charles Wickham in respect of the sums of 2500*l.* arose under the following circumstances.

James Wickham the elder, under his marriage settlement made in 1818, had a power of appointment by will amongst his children over a sum of 10,000*l.*, which in default of appointment was to go among the children equally.

In 1851 Charles Wickham, one of the four children of James Wickham the elder, intermarried with Clara de Havilland Dobree. Previous to this marriage a settlement was executed, by which the lady's fortune was brought into settlement. James Wickham the elder was a party to this instrument, the material parts of which, so far as related to him, were as follows:—

“ And whereas the said James Wickham, in consideration of the natural love and affection which he hath for his son the said Charles Wickham, and in consideration of the said intended marriage, hath consented to make provision for and on behalf of the said Charles Wickham and Clara de Havilland Dobree his intended wife by allowing the said Charles Wickham during his life, and on his decease by allowing the said Clara de Havilland Dobree, should she survive him, an annuity of 150*l.*, to be paid and payable during the life of the said James Wickham as hereinafter mentioned, and the said James Wickham hath also consented and agreed with the said P. S. Dobree and John Wickham that he the said James Wickham will in and by his last will and testament give and bequeath unto and in favour of his said son the said Charles Wickham and the said Clara *de Havilland Dobree, * 476 in case the said Charles Wickham shall then have departed this life, the sum of 2500*l.*, sterling money, and that the said sum of 2500*l.*, and any additional legacy or sum or sums of money which he shall give and bequeath to the said Charles Wickham, shall be so given and bequeathed to the said Charles Wickham, subject to, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, declarations, and agreements herein declared and contained of and concerning the present trust fund. And this indenture also witnesseth, that in consideration of the natural love and affection which the said James Wickham hath for his said son the said Charles Wickham, and also in consideration of the said intended marriage, he the

said James Wickham, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree to and with the said P. S. Dobree and John Wickham, their heirs, executors, and administrators, and other the trustees and trustee for the time being of these presents, that he the said James Wickham shall and will, so long as he shall live, well and truly pay or cause to be paid unto the said Charles Wickham during his life, and on his decease to the said Clara de Havilland Dobree, should she survive him, an annuity or clear yearly sum of 150*l.* sterling, free of all deductions, by equal half-yearly payments in every year, the first payment to be made at the expiration of six calendar months next after the solemnization of the said intended marriage, and also shall and will well and truly pay unto the said Charles Wickham and Clara de Havilland Dobree, or the survivor of them, a proportionate part of the said annuity from the last day when the same shall have become due up to the day when the same shall have ceased and determined, either by the decease of the said James

Wickham or by the decease of the said Charles Wickham * 477 and Clara de Havilland Dobree. And the said James * Wickham doth hereby subject and charge all his real estate situate at Sutton Scotney aforesaid with and to the payment of the said annuity of 150*l.* And this indenture also witnesseth that for the consideration aforesaid he the said James Wickham, for himself, his heirs, executors, and administrators, doth hereby covenant, promise and agree to and with the said P. S. Dobree and John Wickham, their heirs, executors, and administrators, and other the trustees or trustee for the time being of these presents, that he the said James Wickham shall and will, in and by his last will and testament, give and bequeath unto and in favour of the said Charles Wickham, and in case the said Charles Wickham shall have departed this life at the time of the decease of the said James Wickham leaving the said Clara de Havilland Dobree him surviving, then unto or in favour of or in trust for the said Clara de Havilland Dobree a legacy or sum of money not less than the sum of 2500*l.*; and that the said sum of 2500*l.*, and any additional or further legacy or sum or sums of money which he the said James Wickham shall give and bequeath to the said Charles Wickham, or to the said Clara de Havilland Dobree, shall be given and bequeathed to the said Charles Wickham or unto or in trust for the said Clara de Havilland Dobree, subject to and upon and for the

trusts, intents, and purposes, and with, under and subject to the powers, provisos, declarations, and agreements hercinbefore declared and contained concerning the present trust fund in favour of the said Charles Wickham and Clara de Havilland Dobree and the issue of their said intended marriage, save and except that the said Clara de Havilland Dobree shall have no separate and exclusive estate therein, nor shall she have power to bring any portion of the same into settlement in case of her second or subsequent marriage; but nevertheless she shall have only a life-interest * absolute in the same in the event of her surviving the * 478 said Charles Wickham."

Upon the marriage of John Wickham, another of the sons of James Wickham the elder, in the year 1852 the testator covenanted that if the marriage should take effect the executors or administrators of James Wickham the elder should and would, within the period of six months after his decease, pay or cause to be paid to the trustees of the settlement the full sum of 2500*l.* with interest at 4*l.* per cent from his decease up to the time of payment; and trusts were declared of the sum for the benefit of the husband and wife and the issue of the marriage.

James Wickham the elder, by will made in May, 1853, reciting the power in his own marriage settlement, appointed 2500*l.*, part of the 10,000*l.*, "unto and for the use of my said son Charles Wickham in full discharge of my covenant for payment or bequest of that sum contained in the indenture of settlement made on the marriage of my said son Charles Wickham with his present wife."

The testator appointed another 2500*l.*, to his son James absolutely, and another 2500*l.*, to his son John absolutely, with a similar declaration that it was to be in discharge of the testator's covenant in John's marriage settlement. The testator made some dispositions in favour of his daughter and her family, and bequeathed the clear residue of his personal estate to his three sons and appointed them and another person his executors.

The testator died in October, 1855, and his sons alone proved his will. The two sums of 2500*l.* which had been appointed to Charles and John were in October, 1856, paid over by the trustee of the testator's marriage settlement, with the consent of Charles Wickham and * John Wickham respectively, to the * 479 trustees of their respective marriage settlements. In Jan-

uary, 1861, the trustees of these settlements assigned to Charles and John respectively the benefit of the testator's covenants in their respective settlements for payment of the sums of 2500*l.*

The testator's estate, owing to the circumstances appearing in *Rawlins v. Wickham*, (a) proved to be insolvent. A decree for the administration of his estate having been made in January, 1857, in the present suit, Charles and John Wickham claimed to rank as specialty creditors under the above covenants. This claim was resisted by the appellant Mr. Rawlins, the plaintiff in *Rawlins v. Wickham*, who as a creditor had obtained leave to attend the proceedings in the present suit. The Master of the Rolls decided in favour of the claim. (b)

The nature of the question arising as to the three sums of 531*l.* 19*s.* 1*d.*, 137*l.* 4*s.* 8*d.*, and 1440*l.* 0*s.* 8*d.* will be found in the report of the motion before the Master of the Rolls. (c)

Mr. Rolt, Mr. J. Hinde Palmer, and Mr. Welford, for the appellant. — The covenant in Charles's settlement is not for payment of 2500*l.*, but to leave a legacy of 2500*l.* It may be that a demand of this nature has priority over other legacies, but a covenant to leave a legacy cannot come into competition with debts. It amounts to no more than an engagement to give the sum so far as the covenantor can by will effectually give it; the sum therefore is only payable out of assets applicable to the payment of

* 480 * legacies; i.e., out of what remains after payment of debts.

Logan v. Wienholt (d) does not oppose this view; *Fortescue v. Hennah*. (e) But supposing that the covenant in Charles's settlement as well as that in John's amounted to a covenant to pay, we contend that in each case the covenant, on the true construction of the settlement, was satisfied by the appointment made to the son. *Bailey v. Lloyd*. (g) But if not, we say that it was satisfied by the appointment and his acceptance of it on the terms of the will. An appointment in favour of the children of an object of the power is good if made with the assent of the object. A condition annexed to an appointment, though not originally warranted by the power, becomes binding if the appointee assents to it. Here Charles and John testified their assent by directing the

(a) 3 De G. & J. 304.

(b) 31 Beav. 447.

(c) 31 Beav. 478.

(d) 1 Cl. & Fin. 610; 7 Bligh N. S. 1.

(e) 19 Ves. 67.

(g) 5 Russ. 330.

appointed sums to be paid to the trustees of their respective settlements. They have ratified the testator's acts and cannot now recede.

The Solicitor-General (Sir. R. PALMER) and *Mr. Geo. Lake Russell*, for the respondents Charles and John Wickham. — We contend that the covenant in Charles's settlement is not satisfied by the mere insertion in the covenantor's will of a legacy of 2500*l.*, but that it created an obligation effectually to leave that sum so that the legatee should have it. *Logan v. Wienholt* (a) has decided the point. There is no authority for the proposition that a covenant to leave a sum of certain amount does not imply a guarantee that there shall be assets to make good the bequest, and *Eyre v. Monro* (b) shows that it does. The difference of wording between the covenant in this * settlement and John's would * 481 have furnished an argument for the appellant if the two covenants had been contained in the same instrument; but as they are contained in different instruments, between which a considerable time intervened, a difference of intention cannot be inferred from a difference in wording. Then, as regards satisfaction, how could an appointment to the sons of money which the testator had no power to settle, satisfy covenants to leave legacies to be held on the trusts of their settlements? It is clear, on the context of the settlements, that the sons did not enter into any engagement authorizing a settlement of what might come to them under their father's marriage settlement. A covenant to bequeath must be held to refer to property which the testator has power to leave to whom he pleases. A similar question was discussed in *Griffiths v. Gale*, (c) and the Vice-Chancellor held that the words "devise or bequeath" did not refer to an appointment under a particular power; and Vice-Chancellor WOOD, in *Eccles v. Cheyne*, (d) approved of this decision. The appointment to Charles, therefore, could not satisfy the covenant in his settlement. As to the covenant in John's settlement the case is plain: a covenant that the testator's executors or administrators should pay a sum could not be satisfied by a payment made by the trustees of his settlement out of moneys which did not belong to him. The conditions annexed to the appointments were void, and the sons took abso-

(a) 7 Bligh N. S. 1-88.

(c) 12 Sim. 327, 354.

(b) 3 K. & J. 305.

(d) 2 K. & J. 676.

lutely. *Carver v. Bowles*, (a) *Blacket v. Lamb*. (b) So that, according to the appellant's contention, covenants which were intended for the benefit of all the *cestuis que trust* under the settlements were satisfied by gifts under which the wives and children took nothing. What the testator intended was, no doubt,

* 482 merely to * provide that Charles and John should not have the benefit of the covenants and then take third shares of the residue. But then it is said that the sons dedicated the appointed sums to the satisfaction of the covenants. The mere fact that they directed these sums to be paid to the trustees of their settlements goes for nothing unless there be something to show that they did so in exoneration of the father's estate. Now, even apart from the parol evidence, the absence of any such intention is plain. It was not known at the father's death how embarrassed his affairs in reality were. His property being considerable, and the existence of the ruinous claims established in *Rawlins v. Wickham* not being suspected, the residue was of course considered valuable. Now, the sons could not have taken the residue without conforming to the conditions in the will. Under these circumstances it was natural that they should direct the sums of 2500*l.* to be paid to their respective trustees, and their having done so in utter ignorance of the true state of the assets cannot bar them from any right.

Mr. Selwyn and *Mr. Clement Swanston*, for the plaintiff.

Mr. Rolt, in reply. — It is contended by the respondents that the covenant in Charles's settlement creates an obligation to give, and only mentions a testamentary disposition as the mode of giving; but this, I submit, is not the true construction. There is no covenant to leave assets sufficient to answer the legacy; the covenant merely is to bequeath a certain sum. It is no sufficient answer to our case to say that the covenant would thus be illusory, as the covenantor might make away with all his assets in his lifetime:

he might in the same way render illusory an absolute cove-
* 488 nant * for payment. In *Eyre v. Monro* (c) the covenant was to give 3000*l.* by will or otherwise in the covenantor's lifetime, which showed the intention to be that the son was to have

(a) 2 Russ. & Myl. 301.

(c) 3 K. & J. 305.

(b) 14 Beav. 482.

3000*l.* at all events, and the covenant was, in substance, to give the 3000*l.* in some other way if not effectually given by will. But a simple covenant to give 2500*l.* by will is satisfied by making a will containing a gift of a legacy of that amount. *Griffiths v. Gale* (a) turned merely on the construction of the Wills Act. Here the question is, whether the appointment was not a gift by will within the meaning of Charles's settlement. It was no fraud on the power to make such an appointment as this. The case is decided by *Bailey v. Lloyd*. (b) It must be considered that the sons, who were executors, knew the state of the father's assets a twelvemonth after his death, when the appointed sums were paid over to the trustees of their settlements, and they must be held to have elected to take under the will.

Judgment reserved.

June 27.

The Lord Justice TURNER, after stating the facts of the case relating to the sums of 2500*l.* and 2500*l.*, proceeded as follows:—

These are the circumstances under which the question has arisen, whether the defendants John Wickham and Charles Wickham are entitled to stand as specialty creditors upon the estate of the testator for these sums of 2500*l.* The covenants contained in the settlements on the marriages of the defendants Charles Wickham and John Wickham are, it is to be observed, different.

* In the former settlement the covenant is, that the testa- * 484
tor will give and bequeath; in the latter settlement it is, that his executors or administrators will pay. The claim upon the former of these covenants seems to be open to more difficulty than the claim upon the latter of them, and I shall therefore first deal with the case depending upon the former covenant, that in the settlement of Charles Wickham, that the testator will give and bequeath the 2500*l.*

It was argued for the appellant, first, that this covenant was satisfied by the appointment made by the will; secondly, that if it was not satisfied by the appointment, the defendant Charles Wickham, having assented to the 2500*l.* being paid to the trustees of

(a) 12 Sim. 327, 354.

(b) 5 Russ. 330.

his settlement, could not afterwards claim that sum as against the testator's estate; and thirdly, failing both these points, that this sum of 2500*l.* ought to be considered to be payable only out of such assets as would be properly applicable to the payment of legacies,—in effect, that it ought to be postponed to simple contract debts.

As to the first of these points, two positions were advanced in argument on the part of the appellant. First, that the covenant, being simply to give and bequeath the legacy, was satisfied by the gift and bequest being made, without regard to the question whether there were or were not assets to satisfy the gift or bequest; and secondly, that, assuming it to be necessary in order to satisfy the covenant that there should be assets to answer it, there were in this case such assets, for that it was competent to the testator to subject the fund over which he had the power of appointment to the payment of the sum which he had covenanted to give and bequeath. Now it cannot, I think, be doubted that

the object and purpose of this covenant was to secure the
* 485 sum of 2500*l.*, * to be held upon the trusts of the settlement, and this being the purpose of the covenant, it is of course the duty of the Court so to construe it, if it can be so construed, as to give effect to this purpose. In my opinion it may well be so construed. The words to give and bequeath contained in this covenant are not free from ambiguity. They may mean to give and bequeath in point of form, or to give and bequeath in point of substance, and, looking to the purpose of this covenant, there can, I think, be no reasonable doubt that the latter and not the former meaning ought to be attached to the words. In my opinion, therefore, this covenant could not be satisfied unless there were assets sufficient to answer the sum covenanted to be given and bequeathed. I am of opinion also that it was not competent to the testator to subject the fund over which he had the power of appointment to the payment of the sum which he had covenanted to give and bequeath. This fund was not the property of the testator. It belonged to the children, and he had no more than a power of distributing it among them. To hold that he could satisfy the covenant by an appointment of any part of this fund, would be to hold that he could pay his own debt out of his children's property. That it was not intended that the fund, subject to the power of appointment, should be resorted to for the

payment of this sum of 2500*l.* is, I think, evident. Had it been so intepded the power, if not at once exercised, would at all events have been recited or referred to. The case of *Bailey v. Lloyd*, (a) so much relied upon on the part of the appellant in the argument on this part of the case, does not seem to me to assist the appellant's contention. What was said by Sir J. LEACH in that case may well have meant, and as I think really meant, no more than this, that so much of the fund subject to the power as would *satisfy the covenant in the daughter's *486 settlement, so far as it applied to that fund, might well be appointed to her.

The first point, therefore, on which the appellant relied against the defendant Charles Wickham's claim to stand as a creditor for this sum of 2500*l.* cannot as it seems to me, be maintained, and I think the second and third points relied on by the appellant against this claim are equally untenable. As to the second point, the cases cited in the argument show that the defendant Charles Wickham became absolutely entitled to the 2500*l.* under the appointment. There was no contract, no liability, on his part, to permit the sum to be applied to the satisfaction of the covenant. Either he knew or he did not know that he was absolutely entitled to this sum. If he did not know it he cannot be held bound by his assent to the application of the money, and if he did know it he would still, as I apprehend, be entitled to be repaid the money out of the testator's estate, unless he made the payment with intent to discharge that estate. The trustees to whom the payment was made would, by virtue of the payment, become trustees for him, and would be entitled to maintain an action or suit against the testator's estate as such trustees. In this view of the case the question would be, whether the payment was made with intent to discharge the estate, and in my opinion the evidence fails to show that it was made with any such intent.

As to the third point it is sufficient to say that to decide it in favour of the appellant would be to hold that the covenant created no debt, a position which of course cannot be maintained, and which, as it seems to me, would be in direct contradiction of the authorities.

For these reasons my opinion is, that the appellant's * case fails as to the 2500*l.*, for which the defendant Charles * 487

Wickham has been admitted to be a creditor, and certainly it does not less fail as to the defendant John Wickham's 2500*l*.

As to the other sums, the debts due from the testator's sons, which were paid by him, I think it clear upon the evidence that the testator made these payments by way of advancement or gift to his sons. In my opinion, therefore, this appeal is wholly groundless and ought to be dismissed, but my learned brother being of opinion that there should be no costs of the appeal, it will be dismissed without costs.

THE LORD JUSTICE KNIGHT BRUCE. — I agree that the appeal fails.

In the Matter of CHARLES DICKENSON HILL, a person of Unsound Mind, deceased.

1863. January 16, 23. Before the LORDS JUSTICES.

Form of order enabling the administrator of a deceased lunatic's estate to enforce against a defaulting committee of the estate and his sureties the bond to the Crown entered into by them on his appointment.

THIS was a petition by Henry Creswicke, the administrator of the lunatic's estate, seeking, amongst other things, liberty to enforce against a defaulting committee of the estate and his sureties or their estates the bond to the Crown, which had been entered into by them upon the appointment of the committee, and which was in the hands of the masters in lunacy.

Mr. G. L. Russell appeared for the petitioner.

Their Lordships made the following order upon this part of the prayer of the petition : —

“ And we do order that the said petitioner Henry Creswicke be at liberty to take such proceedings as he shall be advised against the said Samuel James [the defaulting committee] and his
 * 488 sureties in the bond dated * &c., given by the said Samuel James, as committee of the estate of the said late Charles
 [378]

Dickenson Hill, for the recovery of any balance which may be due from him on his final account as such committee. And we do order that the said bond of the said Samuel James and his sureties dated, &c., deposited in the office of the masters in lunacy in this matter be delivered to the proper officer in the office of the Queen's remembrancer in the Court of Exchequer to enable the petitioner to take such proceedings as aforesaid."

In the Matter of THE JOINT-STOCK COMPANIES' WIND-
ING-UP ACTS, 1848 and 1849 ;

AND

In the Matter of THE JOINT-STOCK COMPANIES' WIND-
ING-UP AMENDMENT ACT, 1857 ;

AND

In the Matter of THE BRITISH PROVIDENT LIFE AND
FIRE ASSURANCE SOCIETY.

GRADY'S CASE.

1863. February 14, 18. Before the Lord Chancellor Lord WESTBURY.

An action of debt brought against a company by one of its shareholders was compromised on the terms that he should receive a sum of money from the company, and that his shares should be transferred to the managing director. The transfer was made, the consideration money being paid to the shareholder as part of a larger sum handed over to him from the funds of the company, and was entered in the books of the company and returned to the registration office. *Held*, that the above circumstances did not affect the shareholder with notice that the transferee was to hold the transferred shares for the company, the shareholder denying such notice.

Where a company has power to purchase shares, a particular formality only, such as the consent of a general meeting, being required to warrant the exercise of the power, and the company deals with a shareholder at arms' length, and takes from him and completes and enters in its books a transfer of shares, the Court is justified in inferring, as against the company, that the requisite formality had been antecedently supplied or subsequently added to the transaction.

THIS was an adjourned summons having for its object the removal of the name of Dr. Grady from the list of contributories of the above-named company.

The facts, so far as they are material, were the following:—

Dr. Grady had been originally a holder of twenty-five
* 489 * shares in the company's capital and one of its medical officers. Disagreements having arisen between him and the company some time previously to the month of March, 1859, he brought an action against the company to recover a sum of money to which he alleged that he was entitled. That action led to a negotiation which terminated in a compromise, according to the terms of which Dr. Grady was to receive a certain sum of money from the company, and it was part of the arrangement that his shares should be transferred to Mr. Sheridan, the managing director of the company. The transfer was made accordingly by deed dated the 29th of March, 1859, and was duly entered in the books of the company on the 4th of April, 1859; and in the return made to the registration office on the 30th of May, 1859, in the manner required by the statute, Mr. Sheridan was represented as the holder of the twenty-five shares by transfer from Dr. Grady.

The official manager's case was, that Dr. Grady knew that Mr. Sheridan took as a trustee for the company; but, as the evidence was viewed by the Lord Chancellor, that case was supported by nothing save the inference to be drawn from the admitted facts, that the agreement to transfer the shares was part of the general compromise and agreement by which the action was settled; that Mr. Sheridan was the managing director of the company; and that the sum of money entered in the transfer of the shares as the consideration was in reality paid to Dr. Grady as part of the larger sum which was handed over to him from the funds of the company.

On the other hand, Dr. Grady deposed that he had personally agreed with Mr. Sheridan to make a transfer to the latter of the shares, and that Mr. Sheridan, as a reason to induce him to come to terms of compromise, offered to take his shares off his
* 490 hands. He deposed *also that he had no knowledge or reason to believe that Mr. Sheridan was to hold them in trust for the company.

Mr. Sheridan made no affidavit.

By the 157th section of the company's deed of settlement it was provided, amongst other things, that it should not be lawful for the board of directors under the powers for the purpose given

by the deed to purchase any share or shares in the capital of the company without the authority and sanction of a general meeting of the proprietors and members of the company previously obtained.

Mr. T. A. Roberts, for Dr. Grady. — Upon the evidence as it stands Dr. Grady had not actual, and cannot be affected with constructive, notice that Mr. Sheridan, when taking a transfer of the shares in question, in March, 1859, was not purchasing on his own account. His name ought, therefore, to be removed from the list of contributories, either on that ground, *Hollway's Case*, (a) or on the ground of the manner in which the transaction was acquiesced in and confirmed by the company.

Mr. Baily and *Mr. Karlake*, for the official manager. — The evidence is sufficiently clear to show that Dr. Grady must have had actual notice of the position of Sheridan in the matter of the transfer, and of the consequent invalidity of the transaction. Acquiescence for the purpose of binding the company is out of the question.

They referred to *Eyre's Case*, (b) *Ex parte Morgan*, (c) *Stanhope's Case*. (d)

* *Mr. Shebbeare*, for the creditors' representative, referred * 491 to *Richmond's Executors' Case*, (e) and *Lawes's Case*. (g)

A reply was not heard.

The Lord Chancellor, after noticing that it was incumbent on the official manager to establish a case to justify the Court in wholly disregarding the transfer of Dr. Grady's shares to Mr. Sheridan, and in arriving at the conclusion that those shares still remained vested in Dr. Grady, stated the facts and proceeded as follows : —

There is, therefore, the direct statement of Dr. Grady, and the question is, whether it is outweighed and disproved by the *evidentia*

(a) 1 De G. & Sm. 777.

(b) 31 Beav. 177.

(c) 1 Mac. & G. 225.

(d) 3 De G. & Sm. 198.

(e) 3 De G. & Sm. 96.

(g) 1 De G., M. & G. 421.

rei resulting from the transaction itself. The intrinsic evidence resolves itself merely into the facts of the one contract being entered into at the same time as the other, and of the money being paid to Dr. Grady in one sum, which included the consideration for the transfer. But I am not of opinion that I can infer from that, that Dr. Grady knew that Mr. Sheridan was to hold these shares on the part of the company, or that he was in reality to become the assignee of them as the property of the company. Sheridan's affidavit might have contradicted what is deposed to by Dr. Grady. There is nothing said either by the solicitor who acted on the part of the company or by the solicitor of Dr. Grady, or by any of the directors, to warrant me in coming to the conclusion that the statement made by Dr. Grady is erroneous or untrue. I must therefore arrive at the conclusion that the transaction was that which Dr. Grady represents. It may be perfectly true that it

was part of the general compromise. It is very possible * 492 that the directors might have found one of their own body, who, in order to avoid the exposure in the action, was willing to stand in the shoes of Dr. Grady. It is very possible that the money might not be paid separately and distinctly to Dr. Grady, but Dr. Grady might well be warranted in believing that that would be a matter of arrangement between Mr. Sheridan and the other directors, that is, between Mr. Sheridan and the company. I cannot, therefore, arrive at the conclusion that a mere suspicion, to be derived from the mode of completing the transaction, when the fact which I am desired to infer from that suspicion might have been directly proved either by the evidence of Sheridan or by the evidence of the solicitor, is to be placed in the scale as sufficient to weigh down the positive statement of Dr. Grady.

It might be sufficient to rest there, but I am by no means disposed to overlook the rest of the case.

Let it be for a moment assumed that Mr. Sheridan, in point of fact, was acting on behalf of the company. I find that this company was not at all disqualified from purchasing shares, and in that particular the case is wholly in contrast with the cases which have been cited at the bar. It approaches much more nearly to the case of *Bargate v. Shortridge*, (a) which was decided in the House of Lords, than it does to those cases. If a company has no

(a) 5 H. L. Cas. 297.

power to do a particular thing, undoubtedly neither can that power be given to the company by the agreement of the shareholders, nor can the particular thing be inferred to have been done legally merely from acquiescence or from subsequent delay in questioning the transaction. But if a company has power to do a thing, and if there be only requisite a particular formality, such *as * 493 the consent of a general meeting in order to warrant the exercise of that power, then if I find the company dealing with an individual at arms' length and taking a transfer of shares, duly completing that transfer, entering the transfer, and entering the transaction in books, so that I am warranted and justified in imputing a knowledge of it to every shareholder, I am fully borne out, not only by the reason of the thing, but by the express authority of the case to which I have referred, in inferring as against the company that the formality which alone is wanting to the exercise of the power had been either antecedently supplied or has been subsequently added to the transaction.

It has been said in answer to that, that Dr. Grady was a shareholder in this company. That does not in the smallest degree make the matter different as far as regards the inference as to the observance of the formality. If Dr. Grady was a shareholder, as he undoubtedly was, he was a shareholder dealing at arms' length with the company. The company proposed that he should put an end to his action, and they engaged that they would take a transfer of the shares. They had a perfect right to do so provided the shareholders either subsequently acquiesced or had previously given them authority.

I am of opinion that I am perfectly warranted in inferring the fact that that formality was not wanting from the combined effect of all the circumstances of the case. The transfer was duly entered in the books of the company on the 4th of April, 1859. In another book, called the ledger of the company, it also appears that the return was made to the registration office in the manner required by the statute on the 30th of May, 1859. In that return John Sheridan is represented as the holder * of the * 494 twenty-five shares by transfer from William Grove Grady, and there is therefore every thing required for a valid transaction, and every thing that was necessary to give notice to every shareholder of what had taken place, even if I suppose what had taken place to be in reality a purchase by the company. That it was a

purchase by the company there can be no doubt. That that would be totally immaterial as affects Dr. Grady, unless he had notice of it, I have already observed ; but even if he had reason to believe it, yet if I find the transaction dealt with in the manner I have described and acquiesced in by the shareholders of the company for more than two years after the regular completion of it, I do not go beyond that which reason requires and authority justifies in holding that the formality of the consent of the shareholders must be presumed as against this company.

I shall therefore direct the name of Dr. Grady to be taken off the list of contributories.

* 495 *In the Matter of THE JOINT-STOCK COMPANIES
WINDING-UP ACTS, 1848 and 1849 ;

AND

In the Matter of THE JOINT-STOCK COMPANIES WIND-
ING-UP AMENDMENT ACT, 1857 ;

AND

In the Matter of THE BRITISH PROVIDENT LIFE AND
FIRE ASSURANCE SOCIETY.

COLEMAN'S CASE.

1863. February 14, 21. April 25. Before the Lord Chancellor Lord WEST-
BURY.

C. executed the deed of settlement of a company, which provided that no person should be entitled to the rights of a proprietor, who should not have been previously accepted as such by the directors; that no person purchasing shares from the directors should be considered approved by the board as a proprietor until he should have paid down the price, and that upon his making such payment the board should cause his name to be entered in the register of shareholders as a proprietor; that every person who should subscribe for or take or purchase or acquire any shares should from the time of the entry of his name on the register as the proprietor be considered as a proprietor; that every entry or alteration in the register should, as between the company and the last proprietor, be binding; and that the register should, as between the company and every person claiming to be a proprietor, be conclusive evidence on behalf of the company to show whether he was a proprietor.

On an application of C. to be removed from the list of contributories, it appeared that the managing director, S., had induced C. to execute the deed on an agreement that he should be appointed one of the medical officers, and should not be removed except for misconduct. It further appeared that, after a correspondence as to this stipulation, C. insisted that his name should be erased from the list of shareholders and his subscription cancelled. S. finally engaged that the shares should be treated as forfeited, and assured C. that the company would treat his signature to the deed of settlement as a nullity. No entry relating to this transaction appeared in the company's books, except an entry in the minutes of a meeting of the directors after the execution of the deed, to the effect that 300 shares were allotted to C., who however never made nor was required to make any payment in respect of deposit or otherwise, nor received any communication whatever from the company until after an order had been made for winding it up. *Held* —

- 1st. That the contract made between S. & C., even if binding in equity, which (*semble*) it was not, was not within the powers of the directors under the deed of settlement.¹
- 2dly. That C., notwithstanding his execution of the deed, never was a shareholder, nor had entered into a binding contract to become one.
- 3dly. That if C. was a shareholder, it was competent to an extraordinary board of directors to declare his shares forfeited,² and *semble*, that that course would, under the circumstances of the case, have been assumed by the Court to have been taken, if it had been clear that C. had ever become a shareholder under the deed.

THIS also was an adjourned summons, having for its object the removal of the name of Mr. Coleman from the list of contributories of the same company.

* The material facts, documents, and arguments will be * 496 found sufficiently stated in the Lord Chancellor's judgment.

Mr. Jessel, for Mr. Coleman.

Mr. Bailly and *Mr. Karlake*, for the official manager.

Mr. Shebbeare, for the creditors' representative.

The following cases and statutes were referred to: *Bell's Case*, (a) *Ayre's Case*, (b) *Woollaston's Case*, (c) *Richmond's Exec-*

(a) 22 Beav. 35.

(c) '4 De G. & J. 437.

(b) 25 Beav. 513.

¹ See *Barton's Case*, 4 De G. & J. 53, and cases in note (1).

² See *Knight's Case*, L. R. 2 Ch. Ap. 322; *Barton's Case*, 4 De G. & J. 46.

utors' Case, (a) Nicol's Case, (b) Brockwell's Case, (c) The National Exchange Company of Glasgow v. Drew, (d) Bargate v. Shortridge, (e) 7 & 8 Vict. c. 110, § 49; 19 & 20 Vict. c. 47.

April 25.

THE LORD CHANCELLOR. — In the month of January, 1857, the British Provident Life and Fire Assurance Society was desirous of obtaining a transfer to itself of the business of the Diadem Life Insurance Company.

The present applicant, Mr. Coleman, was a holder of 200 shares in the Diadem Company, and was also one of the medical officers of that company.

On the 8th of January, 1857, it was resolved by the board of directors of the British Provident Society that Mr. Sheridan, the managing director, should be authorized to sell to the share-
* 497 holders in the Diadem Company * shares in the British Provident at 12s. 6d. per share in lieu of the first call of one pound per share. It does not appear that this resolution was authorized by any general meeting of shareholders.

Mr. Coleman was afterwards pressed by Mr. Sheridan to take shares in the British Provident Society, and it was agreed between Mr. Sheridan and Mr. Coleman, by a letter of Mr. Coleman dated the 17th of January, 1857, answered by Mr. Sheridan on the 19th of January, 1857, that, in consideration of Mr. Coleman transferring to the British Provident Society the 200 shares he held in the Diadem Company and of his paying the sum of 100*l.*, he should receive 300 shares in the British Provident Society, and should be appointed medical officer of the British Provident Society for the district of East London.

On the 20th of January, 1857, Mr. Sheridan induced Mr. Coleman to execute the deed of settlement of the British Provident Society as a shareholder for 300 shares, but before execution Mr. Coleman again stipulated, not only that he should be appointed one of the medical officers, but that he should not be removed from that office except for misconduct, a condition which was assented to by Mr. Sheridan.

It appears that Mr. Sheridan afterwards desired to retire from

(a) 3 De G. & Sm. 96.

(d) 2 M'Queen, 103.

(b) 3 De G. & J. 387.

(e) 5 H. L. Cas. 297.

(c) 4 Drew. 205.

the engagement that Mr. Coleman's appointment should be a permanent one, and an angry correspondence ensued, in which Mr. Coleman insisted that his name should be erased from the list of shareholders and his subscription cancelled, and Mr. Sheridan appears to have, by a letter dated the 31st of January, 1857, engaged that Mr. Coleman's shares should be treated as forfeited, and afterwards, by a letter to Mr. Coleman * dated * 498 the 2d of February, 1857, he assured Mr. Coleman that the company would treat his signature to the deed of settlement as a nullity.

No entry relating to this transaction appears in the books of the company, except an entry in the minutes of a meeting of the directors of the 22d of January, 1857, after the deed had been signed, to the effect that 300 shares were allotted to Mr. Coleman; but it is the fact that Mr. Coleman was never required to make any payment in respect of deposit or otherwise, and that he never received any notice or communication whatever from the British Provident Society as a shareholder until, the affairs of the company having in the mean time passed into other hands, Mr. Coleman received a letter dated the 8th of November, 1858, demanding payment of 600*l.* as the deposit and amount of calls on 300 shares, to which he replied by denying that he was a shareholder in the company.

His shares in the Diadem Company do not appear to have been transferred to the British Provident Society, and the case against him, therefore, rests on the fact of his having executed the deed of settlement for 300 shares.

The date of the winding-up order is March, 1861.

It was contended before me that Mr. Coleman ought to be relieved in equity from his position of shareholder in the company, because his execution of the deed of settlement had been obtained by a fraudulent representation made by Sheridan whilst acting as the authorized agent of the company in the sale of its shares.

This argument proceeds on the admission that the * legal *status* or character of shareholder was complete at * 499 the time when the winding-up order was made, and seeks to have it annulled on the ground of fraud and imposition.

But it seems to have been decided, that if there be an equity to avoid a contract to take shares in a company on the ground of misrepresentation by a director or agent of the company, which

contract has been legally completed and no proceeding taken to set it aside before the winding-up order, it is not available to the shareholder as a defence against being made a contributory.

I do not stop to examine these cases or the reasoning on which they are founded, because I think the true inquiry in the present case is whether the *status* and character of a shareholder in this company was complete in Mr. Coleman before this winding-up order was made; and this depends on the provisions in the deed of settlement.

By the 149th clause of the deed it is provided "that no person shall be registered as a proprietor of shares in the society, nor entitled to exercise any of the rights or privileges of a proprietor, who shall not have previously been accepted as such by the directors in conformity with the provisions herein contained." And by the 152d clause it is provided "that the board of directors shall cause all sales for or on behalf of the society to be made for ready money, except where they consider it may be injurious to the interests of the society or where it would not be practicable," and then, when they shall sell for credit, they shall take security for the money. By the 157th section it is provided "that, notwithstanding any thing hereinbefore contained, it shall not * 500 be lawful for the board of directors, under the powers * hereinbefore contained, to sell any share or shares in the capital of the society, except shares forfeited on non-payment of calls or instalments, nor to purchase any share or shares without the authority and sanction of a general meeting of the proprietors and members of the society previously in that behalf obtained." And by the 158th section it is further provided "that no person purchasing any share or shares from the board of directors shall be considered approved by the board as fit to be a proprietor of such share or shares until he or she shall have paid down the price required for the same, or so much of such price as shall be required to be paid at the time of his or her purchasing such share or shares, and upon his or her making such payment the board of directors shall cause his or her name, at the expense of the society, to be entered in the register of shareholders as proprietor of such share or shares." By the 168th section it is also provided "that all existing certificates of shares shall be called in and cancelled," and then it goes on to direct that the deed of covenant shall be executed by every shareholder, and that certificates shall be sent

to him before he is entitled to rank as a shareholder. By the 169th section, "that the board of directors shall not only cause the name and place of residence of every proprietor of shares in the capital of the society to be entered in the register of shareholders, but shall also cause to be entered in such register the name and place of residence of every other holder for the time being of shares in the same capital, and the number of shares belonging to such proprietor or other holder." By the 198th section it is further stipulated and provided, "that every person who, after the date of these presents, shall either subscribe for, or take, or purchase, or acquire, either from the board of directors or by any other means, any share or shares in the capital of the society, shall, as to the share or shares so subscribed for, * taken, purchased, or * 501 acquired, be, from the time of his or her name being entered in the register of shareholders as the proprietor of such share or shares, considered a proprietor of the society so far as may relate to the instalments or calls which may thereafter be called for or made in respect of such share or shares, and as to all other duties, obligations, claims, and demands in respect of the same share or shares." By the 203d section it is provided that, whenever there is any alteration, a corresponding alteration shall be made in the register: and by the 204th, that every entry or alteration in the register shall, as between the society and the last proprietor, be binding: and by the 205th it is declared "that previously to the entry in the register of shareholders of the name of any person as a new proprietor of any share or shares in the capital of the society, it shall not be necessary for the board of directors to inquire whether such share or shares hath or have been effectually vested in such person or not; it being the true intent and meaning of these presents that if the name of any person shall have been improperly entered in the register of shareholders as the proprietor of any share or shares, such person, as between him or her and the other proprietors for the time being of the society, shall be a proprietor of the society to all intents and purposes in respect of such share or shares." By the 206th "that the register of shareholders shall, as between the society and every person claiming to be a proprietor of the society in respect of any share or shares, be conclusive evidence on behalf of the society to show whether he or she is a proprietor of the society in respect of such share or shares." By the 208th the certificates are also to be

evidence of the title to shares; and by the 224th section it is provided "that upon the neglect or refusal of any proprietor, or of the husband of any female proprietor, or of the executor or * 502 administrator of any deceased proprietor * or other holder of shares in the capital of the society to pay any instalment within three calendar months after the day mentioned in the circular letter for payment thereof, or upon the neglect or refusal of any person, after his or her being approved of as a proprietor by the board of directors, to execute within the time herein prescribed such deed of covenant as herein is mentioned, then and in such case it shall be lawful for an extraordinary board of directors specially called for that purpose to declare that the share or shares of " such proprietor " shall be forfeited."

From this examination of the provisions of the deed of settlement four conclusions may be derived. First. That the contract made by Mr. Sheridan with Mr. Coleman, even if binding in equity, which I think it was not, was not within the powers of the directors under the deed of settlement. The whole transaction might have been repudiated by the shareholders, and might properly therefore be abandoned by the directors and, to use the words of Mr. Sheridan's letter, treated as a nullity: Secondly. That Mr. Coleman, notwithstanding his execution of the deed, never was a shareholder under the deed. He could not be approved by the board of directors as a shareholder (which is made a necessary act) until he had paid his purchase-money; but he never paid or was asked to pay any part of it; he never received any certificates; was never entered in the register of shareholders, from which time only could he be considered a proprietor or member; and at the date of the winding-up order, therefore, he could not have claimed to be a member of the company. Thirdly. That the register of shareholders is expressly made the exclusive evidence of being a shareholder, a provision which is in strict conformity with the 19th section of the Joint-stock Companies Act of 1856; * 503 whereby it is provided, that no * notice of any trust, expressed or implied or constructive, shall be entered on the register or receivable by the company; and that every person who has accepted any share in a company registered under the Act, and whose name is entered in the register of shareholders, and that no other person (except a subscriber to the memorandum of association in respect of the shares subscribed for by him) shall for the

purposes of the Act be deemed to be a shareholder; and with similar provisions in the earlier and subsequent statutes. Fourthly. That, if Mr. Coleman was a shareholder, it was competent, under the circumstances of the case, to an extraordinary board of directors to declare his shares to be forfeited, a course which Mr. Sheridan in his letter of the 31st of January, 1857, promised should be taken, and which I should have no hesitation in assuming, under the circumstances of this case, to have been taken, if it was clear that Mr. Coleman ever had become under this deed of settlement proprietor of the shares in question. For, from the time of his execution of the deed down to the dissolution of the company, he is never put on the register or in any manner recognized or claimed to be a shareholder; and this fact, added to the other circumstances of the case, would warrant the presumption I have stated.

But my opinion is, that Mr. Coleman never became a shareholder in this company in conformity with the deed of settlement, and that there never existed any binding contract between Mr. Coleman and the company that he should become a shareholder therein. Direct, therefore, that his name be removed from the list of contributories.

* In the Matter of THE JOINT-STOCK COMPANIES * 504
WINDING-UP ACTS, 1848 and 1849;

AND

In the Matter of THE JOINT-STOCK COMPANIES WIND-
ING-UP AMENDMENT ACT, 1857;

AND

In the Matter of THE BRITISH PROVIDENT LIFE AND
FIRE ASSURANCE SOCIETY.

LANE'S CASE.

1863. November 11, 13. Before the Lord Chancellor Lord WESTBURY.

Where the deed of settlement of a joint-stock company provided that the directors should not be at liberty to purchase shares without the sanction of a general meeting previously obtained: *Held*, that it was sufficient if that sanction were obtained before the agreement was finally concluded, and that the directors might in the mean time treat and enter into a conditional contract for the purchase of shares.

Held, also, that such sanction might be inferred from conduct of the company.

Held, also, that it is the duty of a company to keep exact minutes of what takes place at their general meetings, and that if those minutes are not forthcoming, it must be assumed that, whatever ought in conformity with the antecedent proceedings of the directors to have been then submitted to the shareholders, was actually so submitted.

Held, also, that a company transferring shares previously transferred to them thereby ratify the former transfer, and that the circumstance of the shares bearing the same numbers is evidence of their identity.

Where directors had bought shares on behalf of a company in consideration of annuities to be paid by the company, part of whose business it was to grant annuities, and the annuities had been paid out of the funds of the company, and balance-sheets of the accounts of the company had been prepared for the general meetings, *held*, that the company must be assumed to have assented to the purchase.

The 29th section of the 7 & 8 Vict. c. 110, which required the approval of the shareholders to contracts in which directors were interested, *held* not applicable to the case.

THIS was an appeal from an order of the Vice-Chancellor KINDERSLEY dated the 3d of August, 1863, and settling the appellant, Mr. Lane, upon the list of contributories of the same company.

The material facts of the case sufficiently appear from the Lord Chancellor's judgment.

Mr. Glasse and *Mr. F. H. Shebbeare*, for the appellant, referred to *Bargate v. Shortridge*, (a) *Grady's Case*, (b) *Re Saxon Life Assurance Society*. (c)

* 505 * *Mr. Karslake* (*Mr. Baily* with him), for the official manager, referred to *Ex parte Morgan*, (d) *Lawes's Case*, (e) *Stanhope's Case*, (g) *Coleman's Case*, (h) and *Munt's Case*. (i)

Mr. Shebbeare, for the creditors' representative, referred to 7 & 8 Vict. c. 110, § 29.

Mr. Glasse, in reply, referred to *Doe d. Pennington v. Tanriere*. (k)

(a) 5 H. L. Cas. 297.

(b) *Supra*, p. 488.

(c) 2 J. & H. 408.

(d) 1 Mac. & G. 225.

(e) 12 Q. B. (N. S.) 998. See pages 1013, 1014.

(f) 1 De G., M. & G. 421.

(g) 3 De G. & Sm. 198.

(h) *Supra*, p. 495.

(i) 22 Beav. 55.

THE LORD CHANCELLOR. — I entirely agree with the Vice-Chancellor in the position that Mr. Lane cannot be held to have legally denuded himself of these shares, unless he has done so in conformity with the provisions of the deed of settlement. In dealing with a joint-stock company, the provisions of that deed must be observed. The question is one of fact, whether there is evidence before me that the transaction has been carried on in conformity with the deed; whether the circumstances are such as enable me to presume, and render it my duty to presume, that the deed has been complied with, or whether the circumstances are such as estop the company from denying that the provisions of their deed have been duly observed.

It is material to have regard to the course of dealing, and to the transactions which have taken place on the part of the company, after the delivery up to them of the shares by Mr. Lane.

* It appears that Mr. Lane was originally a director of * 506 the company. I quite agree with the remark, that to him, therefore, complete knowledge of the provisions of the deed must be ascribed. He ceased to be a director of the company some time in the year 1855.

He had originally subscribed for or agreed to take 300 shares in the capital of the company. It does not appear that the final certificates of these shares were ever issued to him. All that appears to have been issued to him was a number of what are called the scrip certificates. In the latter part of the year 1855, Mr. Lane was desirous of parting with these shares, either by sale of them to another person, or by a sale and surrender of them to the company. He made a proposition accordingly; that proposition was brought before the board of directors; and it was referred by them to Mr. Sheridan, the managing director, to consider and see in what manner the proposition could be carried into effect. Mr. Lane on the 25th of January attended at the office, and was then informed by Mr. Sheridan, that he either had disposed or could dispose of the shares; but he required Mr. Lane to surrender, and it was agreed that Mr. Lane should surrender, the shares. It was also agreed that he should in lieu of them receive from the company two annuities, one on his wife's life, and one on his own, it being part of the business of the company to grant such annuities. Mr. Sheridan represented to Mr. Lane, that the consideration for the annuities would be a sum of 400*l.*, and Mr. Sheridan re-

quired a special gratuity from Mr. Lane of the sum of 30*l.* in respect of Mr. Sheridan's own personal conduct in the transaction. Mr. Lane accordingly gave to Mr. Sheridan a check for 130*l.* So that he gave the 300*l.* which had been paid on the shares together with a sum of 100*l.*, and these two sums represented the * 507 purchase-money * of the annuities ; the extra 30*l.* being the gratuity to Mr. Sheridan.

I cannot imagine that the question of the validity of the transaction as between Mr. Lane and company is to be affected by the circumstance that Mr. Sheridan received a gratuity of 30*l.* It was a very improper transaction as between Mr. Sheridan and the company. It might have entitled the company to demand from Mr. Sheridan that sum of 30*l.* But it could not impair or affect the validity of the transaction as between Mr. Lane and the company, if in other respects it was not open to objection.

In pursuance of this agreement Mr. Lane delivered to Mr. Sheridan the scrip certificates which Mr. Lane had in his possession, and received from the company some memorandum, or was assured that some entries had been made, by which the annuities of 18*l.* each had been secured to him and his wife. All this was completed, as I understand the evidence, in the month of January, 1856.

There was a provision in the deed of settlement of the company that an annual general meeting should be held. And the 157th clause of the deed provides that the directors shall not be at liberty "to purchase any share or shares without the authority and sanction of a general meeting of the proprietors and members of the company previously in that behalf obtained."

It is, however, impossible to understand this clause as necessarily meaning that the directors shall obtain the approbation of a general meeting before they treat for the purchase of any shares ;

for the treaty would have to be matured as to its terms * 508 before those terms could be * submitted to a general meeting ; and what must have been intended was, that the general meeting should have an opportunity of knowing the terms upon which the shares were proposed to be purchased on behalf of the company. It would consequently be quite competent to the directors to proceed by treaty and negotiation, and even to enter into a conditional contract, provided only that ultimately the sanction of a general meeting was obtained. This word "pre-

vously " has been considered in the Court below as if its meaning was previously to any proposal, previously to any treaty, previously to the contract being considered. I am not of opinion that this is the correct meaning of the term. I hold the meaning of the term to be this, that the sanction of the general meeting shall be obtained to the contract, that is, to the contract when matured and finished, subject only to the condition that this assent and approbation shall be something previous to the contract being concluded and binding the company, and binding of course also the other contracting party. The word "previously" then, consistently with its proper meaning and consistently with the reasonable intent and object of the clause, must be considered to mean previously to the transaction becoming finally valid and binding.

That being so, what I have now to consider is this: whether this contract, concluded so far as it could have been concluded between Mr. Lane and the directors in the month of January, 1856, has or has not been subsequently sanctioned by the company at a general meeting, *modo et forma* as required by this section of the deed. And here I hold myself not only at liberty, but bound, to draw all those conclusions against the company which might be reasonably drawn from the conduct of an individual, and may here be reasonably drawn from the conduct of the company, which in this respect is to be *treated as an individual. * 509 What, then, are the acts that were subsequently done by the company?

I pass over for the moment the scanty evidence which the company brings forward of the immediately subsequent general meeting and what occurred there, passing over it only with this observation for the present, that it was the duty of the company to keep exact and accurate minutes of what took place at their general meetings, and that if those minutes are not forthcoming it must be assumed as against the company that whatever the directors ought to have brought forward at that general meeting, whatever then ought in conformity with the antecedent proceedings of the directors to have been submitted to the shareholders, that was actually so submitted.

I find then, subsequently to the general meeting, that 200 of these shares were actually transferred by the company to a gentleman of the name of Goosey for a sum of 200*l.*; and this dealing

with the shares, it will be observed, could not have been taken by the company except on the basis of the company having duly acquired the shares, and such an acquisition could not have been made except in conformity with the 157th section. This subsequent Act of ownership by the company, which, against them, is pregnant with the fact, that they had duly become owners, is duly entered in their books. And not only did they enter this transaction as a legitimate act of ownership over the shares, but they proceeded to make a call on the new allottee or assignee of these shares in respect of a sum of 100*l.*, being a call at the rate of 10*s.* per share.

The matter does not rest there. The company return the * 510 transaction to the public registry office, and in the * books of the public registry the transaction is entered, so far as Mr. Sheridan is concerned, in terms which state that 200 of these shares had been transferred to the company.

The dates appear to be these: the transfer made by the company to Mr. Goosey is dated in the company's books the 21st of February, 1856. The return to the office is entered in the public book on the 22d of February, 1856. No doubt the return had been made to the office of the transfer or surrender by Sheridan some days previously to the time when the new assignment was made to Goosey, but probably the entry was not made in the public book of the registrar's office until the 22d of February, which is one day after the date of the assignment to Goosey. There was here, therefore, a public announcement to the whole world of a fact which ought to have been known to the shareholders, and which I must take to have been known to the shareholders at the meeting; that 200 of these shares had been transferred to and accepted by the company.

Then the next thing I find is this, that the other 100 shares are not only dealt with by the company but are assigned by them in different portions to five other individuals, who were returned to the public registry. At all events, upon an examination of the matter, there was no evidence produced in support of the hypothesis of Mr. Karlake, that there had been a double issue of shares under the same numbers. Neither was there any evidence to show that the allotment had been previously made; and upon the official manager being asked, on his appeal to the entry in the books, whether there was any date in the entry, he said there was

not. I must assume that if shares are entered as allotted to five persons, and bear the same numbers with the shares * originally allotted to Mr. Lane, and the scrip certificates * 511 of which were delivered up by him, the allotment to the five persons was subsequently made. The 100 shares appear to have been allotted to five persons in the books, and those 100 shares previously allotted to Mr. Sheridan appear on the public registry now as held by those five individuals. It appears impossible to reconcile the acts and conduct on the part of the company with any other hypothesis than this, that the company had legitimately and rightfully become the possessors of those shares originally held by Mr. Lane.

But the matter does not even rest there. The company not only dealt with these shares in the manner which I have described, but they paid the annuities regularly during 1857 and 1858. They made default in payment in 1859, and legal proceedings having been taken, new directors investigated the whole subject, and the company gave its promissory note for the arrears of the annuities, which note was afterwards taken up. I have a transaction, therefore, recognized in a variety of ways during several successive years.

With the light then which I ought to derive from these circumstances, and the conclusions with which they are pregnant against the company, I come to consider the evidence of what took place at the general meeting. There was a general meeting immediately after the transaction, on the 10th of April, 1856. There were also other general meetings. Now a foundation of all just presumption is undoubtedly this, that what ought to have been done at that meeting must be taken to have been done unless there be evidence to the contrary. There can be no doubt that under these circumstances it was right and proper, and the duty of the directors, to bring before the shareholders that particular transaction * which had been thus completed and acted upon, * 512 and in respect of which there had been the subsequent dealing with these 300 shares.

Then is there any thing in addition to this general ground of presumption which would induce me to draw the conclusion that the matter was before the shareholders at that meeting? We find that a balance sheet is made out for the express purpose of being produced to the shareholders at that meeting. I undoubtedly deal

with this company in no severe manner if I take it for granted that the balance sheet was explained to the shareholders, and that the shareholders understood the balance sheet before they adopted it and passed the resolution which they did. The balance sheet contains on the one side "amount received as annuity purchase-money 450*l*." It contains on the other side an entry of "deposit returned" generally, which would be deposits paid when there had been no issue of shares, and then a marked entry "deposit returned on shares 300*l*." The "deposit returned on shares" must mean deposit returned on shares which had been issued. Am I not then to infer that this particular transaction (and there is no other to which it can be referred than the transaction with Mr. Lane) was explained to the shareholders or understood by the shareholders?

The Vice-Chancellor has said that it was *per se* insufficient to give full information. But it was not the duty of Mr. Lane to make the entry. It was the duty of the directors to make the entry. It was the duty of the shareholders to ascertain to what the entry referred; and I conceive myself bound to draw the conclusions, first, that this entry referred to the particular transaction, for there is no suggestion of any other transaction which it * 513 was intended to denote; and secondly, that the entry* was understood by the shareholders. And therefore, upon the ground of the general duty of the directors to bring this before the shareholders, and on the ground that there is an entry in the balance sheet, which I must take the shareholders to have understood, I think that I am warranted in inferring that the transaction was made known to the shareholders at that general meeting.

Then is there any thing in any manner to rebut this presumption or to weaken the force of this conclusion? It was the duty, as I have said, of the company to keep accurate entries of the business transacted at that meeting. A book is produced which is called a minute-book, containing the minutes of the meeting. The minutes of this particular meeting are most important, but they are not completed in any way, neither are they signed by the chairman or the secretary. I do not, therefore, derive from that book any thing that rebuts the presumption or weakens the conclusion at which I have arrived.

I adhere to the principle which I stated in *Grady's Case*, (a)

(a) *Supra*, pp. 488, 492.

and which appears to me consistent, not only with reason and good sense, but with authority, namely, that if a company has power to do a thing, and if there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of that power, and if a company be found dealing with an individual at arms' length, taking a transfer of shares, duly completing the transfer and entering the transaction in the books of the company, the Court is justified and warranted in imputing a knowledge of it to every shareholder, and also in inferring against the company that the consent of the general meeting was given to the *transaction. By adhering to that principle I *514 not only satisfy the law, that the requisitions of the deed must be abided by, but I satisfy moral justice; and I hold that a transaction of this kind could not have been dealt with by the company in the manner in which it has been dealt with, unless it had been formally completed in the manner required by the deed. I find a meeting at which the thing might have been done, and at which it is plain from the balance sheet that it was one of the subjects submitted to the shareholders. I find nothing presented to me to show that it was not considered at the meeting; and therefore, in the absence of any evidence to the contrary, I presume and conclude that the surrender of these shares to the company was assented to and approved of by the shareholders at the meeting that was held on the 10th of April, 1856, and that in consequence of that the subsequent transactions and dealings with these shares were entered into by the company.

Perhaps I am wrong in speaking of this consent of the shareholders as a mere formality. I do not mean by the use of that expression to weaken at all the necessity of the fact being found. There can be no valid surrender or transfer without it, and therefore, when the Court arrives at the conclusion that the transfer is valid and effectual, it must arrive at that conclusion through the medium of first finding the fact that the consent of the shareholders at the meeting was given to the transaction. The Vice-Chancellor, therefore, and myself agree undoubtedly in the principles on which the case is to be considered. We differ unfortunately in this, that the Vice-Chancellor thought he was not at liberty to draw that presumption, which, under the circumstances of the case, I think it my duty to draw.

I am not aware that there are any other grounds upon
 * 515 * which an opposition to the application has been made before me. The great argument has been in some degree, perhaps, superfluous,—the necessity of abiding by the deed, That might have been taken for granted. The other argument was, that in the absence of any thing to prove the fact of the surrender having been submitted to the general meeting, the presumption cannot be drawn that it was considered and assented to. I differ entirely from that argument. I adhere to the grounds and reasons for making this presumption, which are stated in Grady's Case, and which exist to my mind in the present case in a stronger degree than they did in Grady's Case.

On the whole, I consider myself bound to hold that this gentleman, Mr. Lane, was, by reason of the assent of the general meeting held on the 10th of April, 1856, validly divested of the 300 shares held by him, which must be taken and considered to have been lawfully purchased from and assigned by him to the use of the company, and that he ought not, therefore, to have been included in the list of contributories. I must reverse the order of the Vice-Chancellor.

[His Lordship then made the order, the terms of which are set out below, remarking however with respect to the official manager, that his Lordship did not view with favour an attempt to go back so far as was here attempted to be done, when there were other representatives of the shares already liable: and after referring to an argument advanced on behalf of the creditors' representative, founded on the 7 & 8 Vict. c. 110, § 29, as to contracts of directors with their companies, which his Lordship held to have no application to the circumstances of the present case, his Lordship added:] —

I should mention also, that I consider Mr. Knight's affidavit as furnishing no ground for presuming, that * nothing
 * 516 was done at the meeting, because all he deposes to is this, that there was no general meeting at which this particular transaction was approved of, a thing which it is utterly impossible he could know. I cannot accept that statement. If there had been an entry in the books of the company formally and regularly made, it might have been of more weight.

The following are the terms of the order : —

“ His Lordship being of opinion that the shareholders of the said society had notice of the purchase by the directors of the shares numbered 3524 to 3623 and 4981, 5180 inclusive from the said George Lane, and that he was thereby validly divested of the said shares and ought not to be included in the list of contributories of the said society, doth order, that the order dated the 3d of August, 1863, be reversed so far as the same directs that the name of the said George Lane be settled on the list of contributories for 300 shares ; and it is ordered, that the 500*l.* deposited with the official manager of the said society, as in the memorandum dated the 4th of August, 1863, mentioned, (a) be returned to the said George Lane ; and it is ordered, that the costs of the said official manager and creditors’ representatives of this application consequent thereon, and the costs of the said George Lane of and occasioned by his name having been placed on the list of contributories, and of and occasioned by the hearing of the adjourned summons in Court, be ascertained by the Judge charged with the winding-up of the said society, and that such costs be retained and paid out of the assets of the said society.” — Reg. Lib. A. 1863, fol. 2166.

* TOPHAM *v.* THE DUKE OF PORTLAND.¹ * 517

1863. January 12, 13, 14, 16. February 14. August 1. December 5.
Before the LORDS JUSTICES.

The donee of a power of appointing portions among his younger children appointed a double share to a younger child without previous communication with him. But it appeared from the instructions for the appointment, that its purpose as to half of the double share was that it should be held in trust, and the income accumulated during the life of the appointee and twenty-one years afterwards, or until the successor to the title of the appointor should direct the half of the double share and accumulations to

(a) A sum which the Vice-Chancellor had ordered the appellant to deposit as part of the call made upon him, as the terms of not submitting to the order during the long vacation.

¹ S. C. affirmed, 11 H. L. Cas. 32.

be paid to another child who had been excluded by reason of an intended marriage disliked by the appointor. In the absence of such direction the half of the double share and accumulations were intended to be paid to the appointee. The appointee soon after the appointment executed a deed settling the moiety accordingly. *Held*,—

1. That if the appointment and subsequent settlement could be held to be one transaction, the provisions for accumulation and for the control of the appointor's successor in title over the appointed fund could not be rejected as mere excess, so as to give the moiety to the excluded child.
2. That the purpose of the appointment as to the moiety, although uncommunicated, vitiated it as to that portion, but as to that portion only.

A settlor intending to exclude one of his children from a settled annuity, in the event of an intended and disapproved-of marriage, unless the settlor's successor in title should otherwise direct, gave instructions to that effect for a settlement, which was prepared so as to vest the annuity in trustees in trust to pay it to the child and her sister, or either of them to the exclusion of the other, in such shares as the successor to his title should appoint, and subject thereto to the two children equally. The successor first appointed one year's annuity to the sister without any previous communication with her, and afterwards caused to be prepared for her signature an order to her bankers directing them to carry a moiety to a trust account. She signed the order, and afterwards the successor appointed to her the whole annuity, which continued to be paid over to the trust fund under the same order. *Held*, that the appointment was a fraud on the power, and that the intention of the donor of the power could only be collected from the deed creating it.¹

A title cannot be derived under a fraud upon a power in the absence of valuable consideration.²

In considering whether or not a particular appointment is a fraud upon the power, although the motive with which the power was exercised may not be regarded, the purpose may.³

The rights of the persons entitled in default of appointment under a power can be defeated only by its *bonâ fide* exercise.

The general rule laid down in *Daubeny v. Cockburn* (1 Meriv. 626), that where an appointment is made for a bad purpose the bad purpose affects the whole appointment,⁴ does not apply to cases in which the evidence enables the Court to distinguish what is attributable to an authorized from what is attributable to an unauthorized purpose.⁵

THE questions raised by these appeals, which were from a decision of the Master of the Rolls, reported in the 31st volume of

¹ See Kerr F. & M. (1st Am. ed.) 267 *et seq.*

² See *post*, 569, note (1), and cases.

³ See Kerr F. & M. (1st Am. ed.) 272; *Duke of Portland v. Topham*, 11 H. L. Cas. 54; *In re Huish's Charity*, L. R. 10 Eq. 8, 9.

⁴ See Kerr F. & M. (1st Am. ed.) 272.

⁵ See *Carver v. Richards*, 27 Beav. 488; *Ranking v. Barnes*, 12 W. R. 565.

Mr. Beavan's Reports, (a) related to the operation and validity of appointments made, as to some of them by the late, and as to others of them by the * present, Duke of Portland, * 518 under powers vested in them respectively, and the following statement is in substance taken from the judgment of the Lord Justice TURNER.

The first appointment in question was one made by the late Duke of Portland under a power contained in a settlement dated the 8th of June, 1814, which was founded upon a settlement made upon his marriage with the late duchess in the year 1795.

At the date of this settlement of 1814 there were eight daughters and younger sons of the marriage, and by the settlement a sum of 40,000*l.* was secured upon some estates in the County of Nottingham belonging to the Portland family for portions of younger children. The estates were limited to trustees for a term of one thousand years for securing the portions, and the trusts of the term were declared to be, after the decease of the duke, — to levy and raise for the portion or portions of as well the eight daughters and younger sons of the duke by the duchess his wife as the children of the same duke and duchess thereafter to be born the sum of 40,000*l.*, and to pay and divide the same unto or between such daughters and younger sons and future children respectively, or any one or more of them, entire, or in such parts, shares, and proportions, and at such ages, days, and times, and subject to, with and under such provisos, conditions, and limitations over, being for the benefit of some or one of such daughters and younger children and future children, as the duke and duchess by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be sealed and delivered by them respectively in the presence of and to be attested by two or more credible witnesses, should direct or appoint; and for want of such joint direction or appointment, then as the survivor of them * should * 519 after the death of the other of them by any deed or deeds, writing or writings, with or without power of revocation and new appointment so executed and attested as aforesaid, or by his or her last will and testament in writing, or any codicil or codicils thereto, to be signed by him or her in the presence of and attested by the like number of witnesses, direct or appoint; and in default

of such direction or appointment, or in case the same should not extend to the whole of the 40,000*l.*, then to pay the whole thereof or so much thereof whereof there should be no such direction or appointment as aforesaid, unto or equally between or amongst all such daughters and younger sons and future children, share and share alike.

By another settlement, made upon the marriage of the late duke and duchess, another sum of 40,000*l.* was provided for portions of younger children, and was secured upon estates in Scotland belonging to the late duchess, and a power of appointment similar to the power contained in the settlement of 1814 was given to the late duke.

One of the eight younger children mentioned in the settlement of 1814 having afterwards become the eldest son, there were in the result seven younger children of the late duke and duchess; all of whom attained twenty-one. Of these younger children two afterwards died, and their interests in the suit were represented by the defendant the Duke of Portland. Two others of them married, and one-sixth of each of the sums of 40,000*l.* was appointed to each of them, thus disposing of 13,333*l.* 6*s.* 8*d.*, part of each of those sums. The three other younger children were the plaintiff Lady Mary Topham, then Lady Mary Bentinck, the defendant Lord Henry Bentinck, and the defendant Lady Harriet Bentinck.

* 520 No further appointment of any part of * either of the above-mentioned sums of 40,000*l.* was made until the month of October, 1848, and 26,666*l.* 13*s.* 4*d.*, part of each of those sums, was therefore then remaining unappointed.

Before the month of October, 1848, however, the following events had occurred.

Sometime in or before the month of June, 1848, the plaintiff Lady Mary Topham, then Lady Mary Bentinck, became engaged to marry Sir William Topham, and this proposed marriage was much objected to by the late duke.

On the 29th of June, 1848, the late duke and duchess executed a deed of that date, not in controversy in the suit, by which money and stock were assigned and covenanted to be transferred to and into the names of the present Duke of Portland and Lord George Bentinck, upon trust to pay the income thereof to the late duchess for her life; and after her death upon trust to set apart so much and such portion of the trust fund, the annual dividends, interest,

or income arising wherefrom to be calculated at a rate not exceeding 3*l.* per cent per annum would realize not less than 800*l.* sterling, to be held upon the trusts thereafter declared. Then the trusts of that fund were declared to be these, — upon trust that the trustees should stand possessed thereof and of the dividends, interest, and annual income to arise or be received therefrom, upon trust during the life of Lady Mary Topham; and provided the then Duke of Portland during his life, or, after his decease, the person who thenceforward and for the time being during the life of Lady Mary Topham should be Duke of Portland, by any deed or deeds to be sealed and delivered by him in the presence of one or more credible witness or witnesses, and to be attested by the same

* witness or witnesses, and either with or without power of * 521 revocation and new appointment, should so direct or appoint but not otherwise, — to pay and apply an annual sum not exceeding 800*l.* sterling out of the dividends, interest, and annual income to arise or become payable out of this trust fund, or if need should be by and out of a sufficient portion from time to time of the principal of the trust fund, unto or for the benefit of Lady Mary Topham during her life, to be payable and paid to her at such time or times and in such manner and form and under and subject to such provisos, restrictions, and limitations as should be expressed or declared in or by such direction or appointment; and subject to the aforesaid trust and power and to the exercise thereof, upon trust during the life of Lady Mary to stand possessed of the dividends, interest, and annual income for Lord Henry Bentinck, his executors, administrators, and assigns.

The result, therefore, was that certain sums of money and stock producing 800*l.* a year were settled upon trust, if the Duke of Portland for the time being should so appoint, to pay the income to Lady Mary Topham for her life, but not to make any payment to her except such appointment should be made by the Duke of Portland for the time being.

All this was subject to a prior life-interest in the late duchess.

In the year 1844 the late duchess died. Soon after her death the late Duke sent the defendant Lord Henry to the plaintiff Lady Mary, to use his influence to induce her to break off her proposed marriage, and to tell her that if it took place he should leave away from her every thing in his power; and Lady Mary then or before that time agreed not to marry during the late * duke's * 522

life. The late duke, however, was not satisfied with this agreement on her part, and on the 4th of August, 1844, he wrote to Mr. Heaton Ellis, the manager of his property in England, a letter in which, with reference to the trusts created by the deed of the 29th of June, 1843, he expressed himself as follows: "Lord Titchfield [meaning the present Duke of Portland] and I are both of opinion that Lord Henry ought to sign a memorandum showing his understanding of the nature of the trust and the intended application of the accumulations, and the contingency on which it depends."

Mr. Ellis then drew up a memorandum to be signed by Lord Henry Bentinck, and which was accordingly signed by him. This memorandum was as follows:—

"Lazinauld, Sept. 1, 1844.

"Memorandum.—Having given an order on Messrs. Drummond to invest half-yearly in November and May 400*l.* in my name in the new 3½*l.* per cent stocks, and to accumulate the dividends, I hereby declare that I will stand possessed of the fund to be so produced during the life of my sister Lady Mary Bentinck, in trust to be paid to her or applied for her benefit at such time and in such manner as my father or the Duke of Portland for the time being may in writing direct.

"It is understood, in case of no such direction in the lifetime of my said sister, that the fund produced by such investments is to belong to me or my representatives absolutely.

"HENRY BENTINCK."

The order on Messrs. Drummond mentioned in this memorandum was taken by Mr. Ellis to Messrs. Drummond, and was acted upon by them.

Matters stood thus until about the month of September, * 523 * 1848, when the late duke entered into communication with

Mr. Ellis on the subject of appointing the unappointed part of the 40,000*l.* secured by the settlement of 1814, and expressed to Mr. Ellis his wish, as appeared upon the evidence, to appoint a double share to one of his children, by which one who was to be excluded might benefit. A correspondence then ensued between the late duke and Mr. Ellis. On the 27th of September, 1848, Mr. Ellis wrote to the late duke as follows:—

[406]

“Harley Street, 27th September, 1848.

“My Lord, — . . . With respect to the division of the 40,000*l.* charged on the English estate for younger children’s portions (and this is a guide too to what would be done in Scotland), I have cleared up every doubt on my mind, and will now submit the facts.

“Your Grace and the duchess appointed one-seventh (5714*l.* 5*s.* 8½*d.*) to Lady Charlotte Denison on her marriage, and after Lady Caroline’s decease made another appointment of 952*l.* 7*s.* 7½*d.*, thus giving Lady Charlotte 6666*l.* 13*s.* 4*d.*, or one-sixth of the fund. One-sixth (6666*l.* 13*s.* 4*d.*) was also appointed to Lady Howard.

“Your Grace paid the money down in both cases, and thus became a creditor on the settled estate to that amount.

“If nothing were now done, the legal division at your Grace’s death would be this: Your executors would have a claim to these two-sixths actually paid, viz. 13,333*l.* 6*s.* 8*d.*, and the residue unappointed, viz. 26,666*l.* 13*s.* 4*d.*, would be divided into five equal parts. One-fifth to the executors of your Grace as representative of Lady Caroline, viz. 5333*l.* 6*s.* 8*d.* Another fifth to ditto as representative of Lord George, * 5333*l.* 6*s.* 8*d.* * 524 And to Lady Harriet, Lady Mary, and Lord Henry each one-fifth, or 5333*l.* 6*s.* 8*d.*

“But your Grace has the power of dividing the remaining 26,666*l.* 13*s.* 4*d.* in any way you please among younger children.

“If the same course be pursued as before, a further sum of 1333*l.* 6*s.* 8*d.* each would be appointed to Lady Charlotte Denison and to Lady Howard, and to secure an equal division an appointment should be made of 8000*l.* to Lady Harriet, to Lady Mary and to Lord Henry. . .

“C. HEATON ELLIS.”

On the 4th of October, 1848, the late duke answered this letter thus: —

“I understand this to be the state of affairs on which I have consulted you: —

“*English Funds.*

- “1. That there is now divisible a sum of 26,666*l.* 13*s.* 4*d.*
- “2. That I may divide it in any manner I please.

"3. That in order to make an equal division 8000*l.* should be given to my two unmarried daughters each, and to Lord Henry an equal sum, amounting in the whole to the sum of 24,000*l.*

"4. That the remainder, 2666*l.* 13*s.* 4*d.*, should be divided between my two married daughters.

"This being the case, I would propose now to give this last-named sum immediately to them.

"With respect to the other 24,000*l.*, I propose to follow the same course with respect to it as was pursued in 1843, and on the same principle. That is, I would give 8000*l.* to Lady Harriet, and two shares of 8000*l.* each to Lord Henry, of which he should * 525 hold one in * trust, as in the former case subject to any distribution which the Duke of Portland for the time being might direct. I do not know whether you will see any objection to pursue a different course on this occasion from what was pursued on the last. If there is none, I would propose to do this rather by deed than by will. . .

"There remains the Scotch settlement.

"My own belief is (but I may be mistaken) that the sum of 40,000*l.* settled on the Scotch estates has not been touched. If that is the case, and it can be done, I think it would be right, and Lord Titchfield is of the same opinion, to settle it in the same manner as the English sum, and to make of it an immediate distribution."

On the 6th of October, 1848, Mr. Ellis again wrote to the late duke as follows:—

" . . . All your Grace's wishes can be fulfilled. There will be an appointment of 1333*l.* 6*s.* 8*d.* to Lady Charlotte Denison; the same to Lady Howard (the money in these two cases to be paid at once); an appointment also by deed of 8000*l.* to Lady Harriet and of 8000*l.* to Lord Henry, payable at your decease; and, lastly, the appointment by deed of 8000*l.* on the same principle as in the deed of 1843, subject to the direction of the Duke of Portland for the time being. This last has alone as to form required consideration and care, as all acts do when in execution of a power not quite simple. It will, however, be made perfectly safe. The precise form which is preferable is not yet settled. Lady Margaret

Harriet (not Henrietta) and Lady Mary are, I believe, the correct names. Greater exactness is desired in a deed than in a will. These appointments will be prepared at once, and may be ready, I think, by the middle of next week."

Then he referred to the charge of 40,000*l.* on the Scotch estates.

* The late duke and Mr. Ellis were at the same time * 526 corresponding with Mr. Melville, the duke's Scotch agent, on the subject of appointments to be made of the unappointed part of the 40,000*l.* charged on the Scotch estates.

On the 8th of October, 1848, the duke wrote to Mr. Melville thus, apparently having received some deeds from him : —

"My intention is to do this: to make up the sums already given to Lady Charlotte Denison and Lady Howard to the sum of 8000*l.* each, thus adding to each 1333*l.* 6*s.* 8*d.*; to give 8000*l.* to Lady Margaret Harriet; to give 8000*l.* to Lord Henry Bentinck; to give 8000*l.* to ditto on trust to accumulate, and the fund to be applied in such manner as the Duke of Portland for the time being may direct. I propose to pay down these sums.

"A deed to the same effect is in preparation in London and I will direct Mr. Heaton Ellis to send you a copy of it, in order that the deed to be prepared in Scotland may be in conformity to it, supposing always that there may be no objection to it."

And on the 16th of October, 1848, Mr. Ellis also wrote to Mr. Melville in these terms : —

"Harley Street, 16th October, 1848.

"Sir, — . . . His Grace, not long since, wrote to me: I think it would be right, and Lord Titchfield is of the same opinion, that the 40,000*l.* charged on the Scotch estates (for younger children) should be settled in the same way as the English sum, and to make of it an immediate distribution.

* "As to the English 40,000*l.*, the duke having appointed * 527 and paid 6666*l.* 13*s.* 4*d.*, some time since, to Lady Charlotte Denison, he now appoints and pays to her 1333*l.* 6*s.* 8*d.*

"He appoints and pays now 1333*l.* 6*s.* 8*d.* to Lady Howard de Walden under the same circumstances, and he now appoints and

pays 8000*l.* to Lady Margaret Harriet Cavendish Bentinck, and 16,000*l.* to Lord Henry William Cavendish Bentinck, taking assignments to himself in each case, as on former occasions from Lady Charlotte Denison and Lady Howard.

"The simple and correct course will, therefore, I conceive, be (the two sums of 6666*l.* 13*s.* 4*d.* having been also already appointed and paid to the married daughters in respect of the Scotch 40,000*l.*) for you to prepare absolute and unconditional appointments from the duke of 1333*l.* 6*s.* 8*d.* to Lady Charlotte Denison, of 1333*l.* 6*s.* 8*d.* to Lady Howard de Walden, of 8000*l.* to Lady Harriet, and of 16,000*l.* to Lord Henry, and assignments from the several parties of the respective sums to the duke.

"You had better not prepare any settlement or declaration of trust whatever, but simply these appointments and assignments.

"When Lord Henry gets the two sums of 16,000*l.* in respect of the English and Scotch estates, he will dispose of all or any part as he pleases, both sums being his absolute legal property. . . .

"C. H. ELLIS."

This correspondence was followed by the execution, by the late duke, of three several deeds of appointment, dated the 13th of October, 1848.

By the two first of these deeds the late duke appointed * 528 * 1333*l.* 6*s.* 8*d.* to Lady Charlotte Denison and Lady

Howard de Walden respectively, making the sum appointed to each of them 8000*l.*

By the other of these deeds, being the appointment in question in this branch of the case, he appointed that 8000*l.*, being one equal fifth part of the sum of 40,000*l.*, provided for the portions of the children of the marriage of himself and the late duchess, other than an eldest or only son, by the indenture of the 8th of June, 1814, should be raised immediately after his death as the portion or share of Lady Harriet in the 40,000*l.*; and that the sum of 16,000*l.*, being two other equal fifth parts of the 40,000*l.* should be raised immediately after the death of himself the late Duke of Portland as the portion or share of Lord Henry in the same sum.

The two sums of 1333*l.* 6*s.* 8*d.* and the sums of 8000*l.* and 16,000*l.*, constituting together the unappointed part of the 40,000*l.* secured for the younger children by the Scotch settlement, were

in like manner appointed to Lady Charlotte Denison, Lady Howard de Walden, Lady Harriet Bentinck, and Lord Henry Bentinck respectively by another deed of appointment dated the 28th of October, 1848.

It appeared from the evidence before the Court that before these appointments in favour of Lord Henry were made, Mr. Ellis told the late duke that there must be no agreement whatever with Lord Henry beforehand; that the benefit for the child, to whom no appointment was made, must be Lord Henry's own act; and that neither the late duke nor Mr. Ellis, nor any one, ought to have any communication with Lord Henry beforehand: and Mr. Ellis stated that he so told the duke to avoid all legal difficulties and to steer clear of the law.

* The two sums of 16,000*l.* thus appointed in favour of * 529 Lord Henry were dealt with in the following manner:—

On the 14th and 30th of October, 1848, they were paid to Lord Henry's account with Messrs. Drummond, who gave notice to Lord Henry of the sums having been paid to his account. On the 23d or the 30th of October, 1848, but on which of those days was not clear upon the evidence, although the weight of evidence was, in the opinion of the Lord Justice TURNER, in favour of its having been upon the 30th, Mr. Ellis took to Lord Henry an order on Messrs. Drummond for his signature, which order when filled up was in these terms, by the letter M therein mentioned being meant the initial letter of the Christian name of the plaintiff:—

“ London, 30th October, 1848.

“ Messrs. Drummond.

“ Please to lay out 16,000*l.* in the purchase of 3½*l.* per cent stock, in the joint names of the Marquis of Titchfield and Mr. Charles Heaton Ellis, the dividends to be placed in the joint names to account M.

“ 16,000*l.*

“ HENRY BENTINCK.”

Lord Henry signed the order accordingly; but it appeared from his evidence that, when he signed it, it was in blank, both as to the date and as to the account to which the moneys were to be placed. His Lordship's account of the transaction was this,—that he had notice from Messrs Drummond of the two sums of 16,000*l.* having been placed to his credit. That he was then

entirely ignorant of the appointments. That when Mr. Ellis brought him the order to sign he told him that the money was to be put in trust, and also told him why it had been previously placed to his account without any notice. That this had been done because it had been found necessary to place it at his absolute disposal

and that Mr. Ellis also told him that the duke's wishes
 * 530 * were, that he should lay out the moneys as mentioned in the order. He further stated that in all these matters, including the trust-deed next to be mentioned, he was a complete "dummy." That the whole of the matters were exclusively controlled by the duke and that he could do nothing which the duke did not wish to be done ; that every thing was in the duke's hands.

Not only did Lord Henry sign the above-mentioned memorandum, but he afterwards executed a declaration of trust, which was prepared by the late duke's solicitors without any instructions from Lord Henry, and which was to the following effect : —

It was dated the 24th of November, 1848, and made between Lord Henry Cavendish Bentinck of the one part, and the present duke and Mr. Ellis of the other part. It recited that Lord Henry had invested the sum of 16,000*l.* sterling in the purchase of 18,686*l.* 2*s.* 8*d.* 3½*l.* per cent annuities, in the names of the present duke and Mr. Ellis, with the intent (from the natural love and affection which he Lord Henry had for his sister Lady Mary) that a provision might be made for her upon such contingency as thereafter expressed, and that he had accordingly requested the duke and Mr. Ellis to concur with him in the declaration of trust thereafter contained. Lord Henry then declared that the Duke of Portland and Mr. Ellis should, and they declared that they would, stand possessed of 18,686*l.* 2*s.* 8*d.* 3½*l.* per cent annuities, and of the stocks, funds, and securities in or upon which the same or any part thereof, or the produce of the same or any part thereof, might be varied or invested, upon trust thenceforth and until the expiration of the term of twenty-one years from the day of the decease of

Lord Henry, or until, previously thereto, any such appoint-
 * 531 ment should be made as would * entitle Lady Mary to the transfer of the whole of the stocks, funds, and securities then intended to be settled, and of the accumulations therefrom which were thereafter provided to be made, or until Lady Mary should previously die without the appointment of the whole thereof having been made to her or for her benefit, that the trustees for the time

being should accumulate the dividends, interest or income of these stocks, funds, and securities ; and upon further trust at the expiration of the period for accumulation, or at any time or times previously thereto, when and as such one of the present duke and Lord Henry as for the time being might be Duke of Portland should by writing under his hand so direct, transfer, assign, and pay all or any part of these stocks, funds, and securities and accumulations, unto or for the benefit of Lady Mary, in such manner as the said Duke of Portland for the time being might direct ; and, subject to the trusts or purposes aforesaid, or when and as the same should be no longer capable of taking effect, and as to the said trust moneys, stocks, funds, securities, and accumulations, and the dividends, interest, or income thereof, of which respectively there might not have been any such appointment unto or for Lady Mary as aforesaid, to stand possessed of the same upon trust for Lord Henry, his executors, administrators, or assigns absolutely. And in the event of any partial appointments being made in favour of Lady Mary, the accumulation thereby directed was to continue as to the residue of the trust funds.

These facts constituted the first branch of the case. The following were those constituting the second branch :—

By an indenture dated the 24th of June, 1843, the late Duke of Portland covenanted with the present duke, Lord George and Lord Henry, to transfer a sum * of 52,000*l.* 3*l.* 10*s.* per * 532 cent consolidated annuities into their names, and it was agreed and declared that the present duke, Lord George and Lord Henry, should stand possessed of this sum when transferred upon trust to invest the dividends thereof so that the same might accumulate during the life of the late duke, and after his decease to invest the stock and accumulations, and the income to be derived from the trust fund, upon trust for Lady Harriet Cavendish Bentinck and Lady Mary, or for one of them exclusively of the other who should be living at the time of the appointment next thereafter mentioned and the issue then living of both or either of them Lady Harriet Bentinck and Lady Mary Bentinck (whether the parent or ancestor of such issues should be then living or dead), or all or any one or more of the objects of the power, in such parts, shares and proportions, and for such times, with such limitations over or substitutions in favour of any one or

more of them Lady Harriet Bentinck and Lady Mary Bentinck and such issue respectively, and either by way of legacy, portion, present or remote interest or otherwise, and to vest and be payable and paid, transferred and assigned at such time or times, age or ages, day or days, and upon such contingencies, and under and subject to such directions and regulations for maintenance, education, and advancement, and such conditions and restrictions as the late Duke of Portland during his life, or after his decease the person who thenceforward and for the time being during the lives of Lady Harriet Bentinck and Lady Mary Bentinck or the life of the survivor of them should be Duke of Portland, from time to time by deed should appoint; and in default of and until such appointment, and as to such part or parts of the trust fund and the dividends, interest, and annual income to arise therefrom to which such appointment if made should not extend, then upon trust

* 533 during the joint * lives of Lady Harriet Bentinck and Lady Mary Bentinck to pay the dividends, interest, and annual income unto Lady Harriet Bentinck and Lady Mary Bentinck and their respective assigns in equal shares as tenants in common for their own respective absolute use and benefit; and after the decease of either of them, upon trust to pay the whole of the dividends, interest, and annual income unto the survivor of them and her assigns for the then remainder of her natural life for her own absolute use and benefit; and after the decease of the survivor of them Lady Harriet Bentinck and Lady Mary Bentinck, then as to the said trust fund and the future dividends, interest and annual income to arise therefrom, upon trust for the person who at the decease of such survivor of Lady Harriet Bentinck and Lady Mary Bentinck should then be Duke of Portland, for his own absolute benefit.

It was to be observed, that, in default of the power being exercised, there was an immediate trust to pay the income to Lady Mary Bentinck and Lady Harriet Bentinck in equal shares.

By another indenture of the 24th of November, 1848, the late duke assured his Marylebone estate to the use of Charles Heaton Ellis and his heirs, upon trust, after the death of the late duke, amongst other things to raise an annuity of 2720*l.* sterling during the joint lives of Lady Harriet and Lady Mary, and pay the same to the present Duke of Portland and Lord Henry, to the intent that the Duke of Portland and Lord Henry should pay the same

annuity when payable from time to time to Lady Harriet and Lady Mary in such parts, shares, and proportions, or unto either of them in exclusion of the other of them, and with, under, and subject to such conditions or restrictions as the Duke of Portland during his life, * or, after his decease, as Lord Henry during * 534 his life, or after the decease of the survivor of the Duke of Portland and Lord Henry as the personal representative or representatives for the time being of the Duke of Portland and Lord Henry from time to time should direct or appoint; and in default of and until such direction or appointment, and as to such part or parts of the annuity of 2720*l.* of which for the time being there should not be any such direction or appointment, then to the further intent that the Duke of Portland and Lord Henry should pay the annuity, or the unappointed portion thereof, unto and between Lady Harriet and Lady Mary in equal proportions. Then followed various provisions for the events (which did not happen) of Lady Harriet or Lady Mary dying in the lifetime of the late duke, and provisions as to what was to take place in the event of one dying before the other. There was a like trust in default of appointment of the other sum.

The late Duke of Portland died on the 27th of March, 1854. Soon after his death the present duke had an interview with Lord Henry upon the subject of Lady Mary's fortune, and what then passed between them was thus stated by Lord Henry:—

“The present duke made a proposal to me with regard to withholding her income unless she became a widow, and for increasing her income in case of a legal separation. I objected to the latter, but assented to the former. This was after the late duke's death and before the marriage. It related generally to all Lady Mary's income, the particulars of which I was ignorant of. The direct proposition of my brother was, that as his health was thought by some to be very precarious and they calculated on his death, to know if I would back him up in the course he was going to adopt in case I * succeeded to the title. He told me that * 535 the object was not absolutely to take away her income, but to suspend it to accumulate in order that it might be dealt with afterwards as circumstances might arise. He did not say to me that the intention was not to give it to anybody else, but to retain it for Lady Mary conditionally. He did not go into that point.

My opinion and his, I believe, would have been different upon that. He did not go into the details of how it was to be done. This was the only interview I had with the present duke upon the subject."

About the month of June, 1854, the duke appeared also to have been in communication with Mr. Ellis upon this subject, and what passed between them was thus stated by Mr. Ellis:—

"About June, 1854, I had some communication with the present duke in reference to 'guarding' Lady Mary's income. The word 'guarding' meant preventing Lady Mary from having any absolute interest in the money at that time. The conversation was with a view that she might have an interest in the money at a future period if the duke chose. It was with a view of preserving the money subject to a future control of the duke. I do not mean that the word 'guarding' was used in the conversation between me and the present duke. Our conversation referred to the interest of Lady Mary in the annuity of 2720*l.* and in the 52,000*l.* fund.

"When I said above that the conversation was with a view that Lady Mary might have an interest in the money at a future period if the duke chose, I meant to say if Lady Harriet chose; and when I said that the conversation was with a view of preserving the money subject to a future control of the duke, I meant to

say the future control of Lady Harriet. I think from the
 * 536 * conversation between me and the present duke that he thought that Lady Harriet would not touch the money for her own use. I communicated with Lady Harriet on the subject but only once; I do not remember seeing her on the subject. I think the only communication I had with her on the subject was by my letter of the 4th of October, 1854. I think that my communications with the present duke on the subject began about June. I think that the marriage of Sir W. Topham with Lady Mary was then imminent. The duke would have preferred that the money should accumulate subject to his future orders for one or the other sisters without Lady Harriet's intervention."

On the 22d of June, 1854, Mr. Ellis wrote thus to the duke:—

"The draft appointments, until revoked or varied, of the fund

which was originally 52,000*l.* 3½*l.* per cents, and of the 2720*l.* annuity, have been prepared and are ready to be transcribed for execution. One witness (your Grace's valet) to your signature will be sufficient. The appointment of all the dividends and interest in the first case, and of the whole annuity in the last, is unavoidably made to Lady Harriet, and no bargain or arrangement should be made with her beforehand, lest the appointment be vitiated.

"I dare say it will occur to her Ladyship afterwards, or it can prudently be suggested to her, that one-half of the interest and dividends, and one-half of the annuity, as it is paid, should be laid out to accumulate, as she would not like, in the present state of things, to benefit personally beyond her own moiety."

This letter, it appeared, related to a proposed appointment of all the dividends and interest of the 52,000*l.* 3½*l.* per cents and of the whole of the annuity of * 2720*l.* to Lady Harriet. * 537 And with reference to that subject, Mr. Ellis, in answer to the following question, — "Were there not several modes discussed between you and the duke of carrying out the duke's wishes?" made this further statement in his evidence: —

"There were several discussions on the subject, but I do not remember that there were any between me and the duke. I do not remember whether or not I spoke to the duke as to these modes. I cannot say whether or not I had seen the duke on the subject of my letter to him of the 22d of June, 1854, before I wrote that letter. I do not mean to say that my letter of the 22d of June was the first introduction of the subject between him and me. The duke must have written or spoken to me, saying that he wished to exercise his power to the exclusion of Lady Mary, and that Lady Harriet was to decide, considering her father's wishes, as to the destination of the fund."

Then the question was asked, "Was not the duke most loath to use the agency of Lady Harriet?"

The answer was: —

"He was averse to it. I did not suggest any plans to avoid that, but counsel considered it. I did not attend consultations

with counsel on the subject. I saw Mr. Hanbury Jones once upon the subject, I think. I believe there were many consultations between counsel and the duke's solicitor upon the subject. I think I communicated to the duke the difficulties which counsel raised in carrying out his wish, and that they, one and all, were of opinion that his wish could not be carried out with perfect safety. I think that the duke had no communication with Lady Harriet upon the subject."

In the result the appointment referred to in the last-mentioned letter seemed not to have been executed and * a case was laid before counsel containing the following statement, which the duke, in his evidence, said was a correct representation of his intentions:—

"C. D. [meaning the Duke of Portland] is desirous of appointing the interest and annual income to arise from the trust funds so that one-half of the income shall be payable to J. K. [meaning Lady Harriet], for her absolute use, and that the remaining half shall (at least for the present, and until it shall be seen what events are likely to happen) be withheld or kept in abeyance, or otherwise dealt with, so that they might, according to the course of such events, be, if it were thought right, ultimately payable to L. M. [meaning Lady Mary] or her issue, or otherwise to J. K. In a word, to keep, by the appointment, an effectual control over this moiety of the trust fund, so as for it to be dealt with according to circumstances.

"It has been suggested that it is not competent for C. D. so to deal with the trust funds; but as the settlor directed that the interest from the trust fund should be accumulated during his life, and which has been carried out, that all power of accumulation is gone, and that an actual and present ownership of and in the trust funds, or of the dividends or annual interest to be derived therefrom, must, if the appointment be exercised, be given at once and immediately to both or one of the two objects of the power, and, therefore, that for L. M. for the present to be excluded from all participation, the beneficial interest, until further appointment by C. D., must be given to J. K. absolutely.

"The fear, however, is, that if such an absolute interest be appointed to J. K. in the dividends and annual income of the trust

funds, she, J. K., will promise and give over to her sister L. M. one-half of the dividends or annual income, and thus defeat the intention of the * settlor (her father), and which inten- * 539 tion the son C. D. is most anxious to carry out."

Counsel, it appeared, were unable to agree on any safe mode of carrying the duke's wishes into effect, and it was accordingly determined that a provisional appointment, as well of the dividends of the $3\frac{1}{2}$ per cents as of the annuity, should be made to Lady Harriet. Accordingly, on the 20th of September, 1854, Mr. Ellis wrote to the duke as follows:—

"I could have much wished that the agency of Lady Harriet could under the circumstances, even at a trifling risk, have been dispensed with; but after much consideration the present appointments will be pretty much what were first proposed, with this little difference, that Mr. Loftus Wigram considered it advisable that the appointment of the annuity should apply to the next accruing payment; and so be made from time to time (thus the end of this month another appointment might be signed applicable to the quarter which will become due the 27th December).

"It was originally considered that no appointment could be valid unless an absolute interest were given by the very act to one or other of the donees of the power: in other words, that ownership must be conferred at once on one or both of the ladies, and not kept in suspense. Mr. Hanbury Jones could not divest himself of this view."

Then he referred to what had passed with counsel, and proceeded:—

"Under these circumstances the only course admitted by all to be clearly legal was for the emergency adopted; and the whole of the next accruing payments are appointed to Lady Harriet, as nothing would be more irksome than that an appointment executed by your Grace should if disputed be set aside; and one cannot * tell if T. should be desperate that he might not have * 540 recourse to litigation. The present appointments can at least be relied on. Possibly a slight risk may be run at a future time if it be sanctioned by a first-rate man.

"To come to Lady Harriet. The quarter's annuity is only due the 27th instant, and the next dividends in October; so that about the end of this month it would be desirable her Ladyship should sign an order directing Drummonds to invest half in the funds in the names of trustees (say your Grace and Lord Henry). Probably the order had better when drawn ready for signature be sent to your Grace.

"There remains one more point: in fact, the dividends of the accumulated fund due on the 5th of April last belonged, not to the executors, but to the ladies: and Drummonds, having no order to the contrary, invested it as before in the purchase of additional stock. There will then be two orders for your Grace's selection.

"One marked No. 1, by which Messrs. Drummond will be directed by yourself and Lord Henry to retain half till further orders.

"The other, No. 2, is the strictly legal one, giving the half to Lady Mary, as there was no appointment to the contrary in existence.

"I rather expect that your Grace will sign No. 1.

"Being unavoidably lengthy this evening, I have avoided detail, and mentioned only annuity and dividends of stock, but the accumulated fund consists of stock and a mortgage for 50,000*l.*, the interest on which is in the same position as the dividends . . . The sisters will, I think, take a good part for the honour of the family."

On the 21st of September, 1854, accordingly, two deeds * 541 of appointment were executed, being temporary * appointments to Lady Harriet of accruing dividends on the 52,000*l.* consols and the accruing payments of the annuity.

After the execution of these appointments, and on the 4th of October, 1854, Mr. Ellis wrote to Lady Harriet Bentinck as follows:—

"I have the honour to enclose an order for your Ladyship's signature, and in doing so I should explain that the duke lately executed deeds, revocable at any time, but under which no payments beyond 600*l.* a year can for the present be made to Lady Mary.

"The half-year's dividend on 21,400*l.* 3*¼* per cents will this

month be paid to your credit by the trustees, as well as 680*l.*, less property tax, for the quarter's double annuity.

"The arrangement made, which will be completed by the enclosed order (setting aside and making a fund for future disposal) has appeared to be the best, if not the only, mode of faithfully carrying into effect the late duke's views and intentions."

The order enclosed in this letter was an order not confined at all to the dividends which had been actually appointed, but was general, and was in these terms:—

"London, 18th October, 1854.

"Messrs. Drummond,

"Please to invest one-half the payments in future to be made to my credit from the joint account of the Duke of Portland and Lord Henry Bentinck (marked S.) in the purchase of three per cent consols in the names of the Duke of Portland, Lord Henry Bentinck and myself.

"HARRIET M. BENTINCK."

* This order was signed by Lady Harriet and returned to * 542 Mr. Ellis on the 18th of October, 1854. Mr. Ellis then took the order to Drummonds', and on the 19th of October, 1854, a quarterly payment of the annuity and some further moneys arising, as it would appear, from the dividends of the 3½*l.* per cents which had in the mean time been standing to an account with Messrs. Drummond in the names of the Duke of Portland and Lord Henry Bentinck, were transferred from that account to the account of Lady Harriet; so that in truth Lady Harriet received no part of the moneys appointed by the deeds of the 21st of September, 1854, until she had signed the above-mentioned order. On the 20th of October, 1854, one moiety of the amount thus transferred to Lady Harriet's account was invested in bank 3*l.* per cents in the joint names of the Duke of Portland, Lord Henry Bentinck, and Lady Harriet Bentinck, and on the 28th of October, 1854, they gave a power of attorney to Messrs. Drummond to receive the dividends and an order to invest and accumulate them. The annuity and the income of the 3½*l.* per cent annuities, or of the funds representing that stock, appeared from that time to have been carried to Lady Harriet's account;

and as to one moiety, with some slight exception arising from an accidental oversight, invested and accumulated in the manner above mentioned.

Lady Mary it appeared married the defendant Sir Wm. Topham on the 4th of September, 1854. The above-mentioned appointments of September, 1854, being provisional merely, a further consultation appeared to have been had with counsel in November, 1854, and on the 10th of that month Mr. Bailey, the solicitor of the Duke of Portland, wrote to Mr. Ellis as follows: —

“ I have had a long conference with Mr. Loftus Wigram,
* 543 and the result is that we have finished where * we began.

He is of opinion, as placing the appointment beyond all question, the whole of the annuity and the whole of the dividends of the 52,000*l.* should, subject to revocation and until revocation, be appointed to Lady Harriet during the joint lives of herself and Lady Mary; then for Lady Harriet of her own free-will and as her own act to give a running order to Messrs. Drummond to invest one-half of the funds as paid to her account in the names of the Duke of Portland, Lord Henry Bentinck, and herself; and to accumulate the dividends of the investment, and also to execute a declaration of trust that all such investments and accumulations should be subject to the appointment of the duke, Lord Henry, and Lady Harriet, or the survivors or survivor of them. Unless the declaration of trust be executed, the funds, although standing in the names of the three, would still remain the property of Lady Harriet, and she might at any time dispose of them in any way she thought proper, or in case of her death without any disposition they would form part of her personal estate and be dealt with accordingly.”

Accordingly on the 19th of December, 1854, two other deeds of appointment were executed by the duke by which the whole of the income of the 52,000*l.* consols, and the 3*1*/₄ per cents, and the whole of the annuity of 2720*l.* were appointed to Lady Harriet for her life, subject to a power of revocation.

The Master of the Rolls held, with regard to the first branch of the case, that the appointment under the settlement of 1814 was bad as to the whole of the 16,000*l.* thereby appointed to Lord Henry Bentinck, and made a like declaration with regard to the

appointment made about the same time with regard to the 16,000*l.* raisable from the Scotch estates; but with regard to the second * branch of the case, his Honor held, that the ap- * 544 pointments thereby brought into question were valid.

Lord Henry Bentinck appealed against his Honor's decision on the first branch of the case; and Lady Mary Topham appealed against his Honor's decision on the second branch.

The present Duke of Portland waived any claim which he might have had as an original younger son, and it was agreed that he should represent for the purposes of the suit the estates not only of his deceased younger brother and sister, but also of his father the late duke.

The Solicitor-General (Sir ROUNDELL PALMER), *Mr. Rolt*, *Mr. Charles Hall*, and *Mr. Rowcliffe*, for the appellant Lady Mary Topham. — This case arises out of an attempt to extend the paternal control over marriage beyond its natural and legal limits. With respect to the first branch of the case, that relating to the 16,000*l.*, the whole arrangement of 1848 was one single transaction, the substance of which was an endeavour to create by appointment under the settlement of 1795 the trusts of the deed of the 24th of November, 1848, executed by Lord Henry. The appointment by the late duke to Lord Henry, and the execution by Lord Henry of the trust-deed itself, were merely forms gone through in obedience to the advice of Mr. Ellis, in order to enable the duke to deal with the settlement funds as he had dealt with his own money in 1843. Nothing was further from the duke's mind, when he executed the deed of the 13th of October, than the idea of making an appointment of 16,000*l.* to Lord Henry. The fund passed by that deed subject to a trust of the duke's own creation, and Lord * Henry, even if he ever really had a formal con- * 545 trol over it, admits that he was a mere instrument in his father's hands. Referring the trusts, therefore, of November, 1848, to the original powers of the marriage settlement, they are, as they stand, invalid in two respects. First, they involve an accumulation for twenty-one years after the death of Lord Henry, a direction which will not only be considered as merely *in terrorem*, but which, if substantial, would be bad for remoteness. Secondly, they unlawfully delegate to the present duke and Lord Henry the discretion which was reposed by the original power in the late

duke personally. The Master of the Rolls has accordingly held the transaction void *in toto*. But an attentive examination of the trusts will disclose sufficient indications of an intention to benefit Lady Mary to enable the Court to uphold the deed, as containing, in substance, a valid appointment of 8000*l.* to her. Rejecting the power, there remains a trust for accumulation for twenty-one years after the death of Lord Henry. It cannot have been intended that an appointment under the power should be a condition precedent to the vesting of the fund in Lady Mary at the end of the period, because the power itself might expire by the death of both the appointors before that time, and the rejection of the power therefore leaves a vested interest in Lady Mary, qualified only by a direction for accumulation, which must also be rejected. *Carver v. Bowles*, (a) *Ring v. Hardwick*, (b) *Lassence v. Tierney*, (c) *Saunders v. Vautier*, (d) *Sadler v. Pratt*. (e)

[THE LORD JUSTICE TURNER. — If you sever, how can the validity be tested by the motive alone? How can you sever the motive?]

If this should be considered too refined, the whole deed * 546 must be set aside. It cannot, * at all events, be held, as was contended in the Court below, that the ultimate limitation to Lord Henry should stand alone, for it is dependent, and not alternative. *Monypenny v. Dering*, (g) *Beard v. Westcott*, (h) *Lethieullier v. Tracy*. (i) *Ingram v. Ingram*, (k) which was relied on in the Court below in support of Lord Henry's claim, is considered by Lord ST. LEONARDS (l) to have no application to a case like this. In fact, there was no intention to give any interest to Lord Henry, except in events which depended upon the validity of the preceding limitations.

The second branch of the case bears the same character of fraud upon the settlements of the 52,000*l.* and the annuity, and the machinery for evading them was still more apparent. Lady Mary having, at her father's death, no issue, it became necessary either

(a) 2 R. & Myl. 304.

(b) 2 Beav. 352.

(c) 1 Mac. & G. 551.

(d) Cr. & Ph. 240.

(e) 5 Sim. 632.

(g) 2 De G., M. & G. 145.

(h) 5 Taunt. 393; T. & R. 25.

(i) 3 Atk. 728, 774, 784.

(k) 2 Atk. 88.

(l) Sugd. Pow. p. 515 (8th ed.).

to allow her to receive half the income or to appoint it to Lady Harriet. The duke wished to do neither, but to accumulate it; and, not feeling quite sure of Lady Harriet's co-operation, he first executed revocable appointments of one dividend under each settlement, then procured from her a general order to accumulate, and then, without telling her, appointed further dividends upon which the order might operate. The appointments were made solely on the faith of the order, and there was no intention to make any complete appointment to Lady Harriet at all. She had no knowledge of her rights even under the first appointments. Mr. Ellis's letter to her of the 4th of October, 1854, assumes throughout that she could derive no benefit under the order; and the power of revocation was available to prevent her from acting contrary to the *duke's wishes. As to the subsequent appointments, * 547 the signing of the order constituted a complete bargain beforehand, and its revocable nature only made it fit in with the appointments more closely.

The Master of the Rolls on this part of the case held that the scheme was in substance consistent with the intention of the donor. But even if that were so in fact, the Court cannot look for the intention beyond the deed creating the power. *Lee v. Fernie.* (a) The fallacy lies in confounding the intention of the late duke in his fiduciary character of donee in the first branch of the case with his unfettered intention as donor in the second. The Court may look to extrinsic evidence for the intent with which a trust is executed, but not for that with which a gift is made.

The result of the arrangement was to accumulate half of the income of the 52,000*l.*, and of the annuity beyond the period permitted by law or by the deeds settling them, and to delegate the discretion of ultimately giving it to the persons in whose names it was placed at the bank; and these purposes being unauthorized, the appointments must fail.

Two questions remain to be discussed, — the first, whether previous knowledge of the unlawful purpose on the part of an appointee is necessary to constitute the appointment a fraud upon the power, or whether accession on the part of the appointee, relied upon by the appointor in making the appointment, is not sufficient; the second, whether the consequent avoidance is partial

(a) 1 Beav. 483.

or total. As to the first of these questions, although an
 * 548 agreement is in most of the cases proved or implied, yet * the
 precise instant at which the appointee acceded is not relied on.
 The question depends not upon the doings of the appointee but
 upon the purposes of the appointor. Powers are in some sense
 fiduciary, and the interests in default of appointment can only be
 defeated by the exercise of *bonâ fide* judgment in making the
 appointment. "Ill-motive," as well as "bargain," is recognized
 by Lord St. LEONARDS (a) as amounting to fraud; *Lord Hinch-*
inbroke v. Seymour, (b) which, on whatever ground decided, (c)
 might, in the opinion of Lord ELDON (d) and Lord St. LEON-
 ARDS, (e) be solidly rested on uncommunicated motive. *Wellesley*
v. Mornington. (g)

The accession of Lord Henry was as much a matter of calcula-
 tion here as were in those cases the chances of survivorship —
 indeed it was far more certain. Lady Harriet's assent was actually
 tested. In *Lee v. Fernie* (h) Lord LANGDALE proceeds directly on
 the purpose. The decision in *In re Marsden's Trust*, (i) therefore,
 which was assailed in the Court below, but which is cited by Lord
 St. LEONARDS (k) without disapprobation, only carries into effect
 the established principles of equity. There the continuance of
 the influence for a far longer time than in this case was relied
 upon. And the consequence of opening the door to fraud in this
 way would be a virtual annihilation of the whole doctrine of
 frauds upon powers.

Another doctrine of equity also lies in the way of the
 * 549 validity of this transaction when considered as a whole, * viz.,
 the maxim, "Omnis ratihibitio mandato æquiparatur." Ac-
 cession by the appointee places him in the same position as if a
 bargain had been made with him previous to the appointment.

On the second question, the fraud involved in these transactions
 must avoid the appointments in their whole extent. *Daubeny v.*
Cockburn, (l) *Agassiz v. Squire*. (m) If the purpose be the test,
 the whole act, depending upon the purpose, must abide the test.

(a) Sugd. Pow. p. 606 (8th ed.).

(h) 1 Beav. 490.

(b) 1 Bro. C. C. 395.

(i) 4 Drew. 594.

(c) See 2 K. & J. 153.

(k) Sugd. Pow. p. 617 (8th ed.).

(d) *M'Queen v. Farquhar*, 11 Ves. 479.

(l) 1 Meriv. 626.

(e) *Keily v. Keily*, 4 Dru. & War. 55.

(m) 18 Beav. 431.

(g) 2 K. & J. 143.

In all these cases of bargain, there is a residue of benefit for the appointee; but the only instance in which any part of the appointment is allowed to stand is where valuable consideration has been given. *Lane v. Page*, (a) Sugden on Powers. (b) In the deed of 1848 the extra benefit was for the instrument, the *particeps criminis*, and cannot be severed.

Mr. Selwyn and *Mr. Bardswell*, for Sir William Topham; and *Mr. Lloyd*, for Mr. Ellis,—took no part in the argument.

Mr. Baggallay, *Mr. Osborne*, and *Mr. W. Morris*, for Lord Henry Bentinck.—We contend, in the first place, that where a disposition of the appointed property, wholly or in part, is made by an appointee, in consequence of influence or pressure exercised upon him by the appointor, but without previous agreement, the Court will not, in the absence of corrupt motive, inquire into the nature of the disposition so made, unless it be made to appear that the influence or pressure was of such a nature as that it would have entitled the appointee to set aside his own act.

* The cases in which appointments have been set aside, * 550 on the ground of fraud, are of three classes: first, cases of agreement with the appointee, such as *Daubeny v. Cockburn*, (c) and *Birley v. Birley*; (d) secondly, where the appointor intended a benefit to result to himself, of which *Lord Hinchinbroke v. Seymour* (e) is the type; and thirdly, cases which combine both those defects, such as *Aleyn v. Belchier*, (g) *Askham v. Barker* (h) *Farmer v. Martin*, (i) and *Jackson v. Jackson*. (k) In all these the vice was twofold: the property was diverted from the objects of the power, and either the appointee (as in the first and third classes) received a benefit as a consideration for the diversion, or (as in the second class) the appointor made himself secure without the need of resorting to an agreement. In those cases where no bargain appears, the fraud entirely depends upon its being the appointor himself who takes the benefit; and even then, it is only distinct moral fraud which calls for interference. In *Fearon v.*

(a) Amb. 233; Sugd. Pow. p. 951 (8th ed.).

(b) Pages 610–612 (8th ed.).

(c) 1 Meriv. 626.

(d) 25 Beav. 299.

(e) 1 Bro. C. C. 895.

(g) 1 Eden, 132.

(h) 12 Beav. 499.

(i) 2 Sim. 502.

(k) 4 Bro. C. C. 462.

Desbrisay (a) and *Beere v. Hoffmister* (b) appointments were upheld, the objects of which were not to benefit the children, but to displace the gifts over. *In re Marsden's Trust*, (c) if it proceed upon the doctrine contended for on the other side, is unique; but there the wife was entirely under the husband's influence, and the husband could not be allowed to take advantage of his own fraud. Moreover, he was not an object of the power. This case is free from both the vices mentioned.

It is altogether unsound to say that accession is equivalent * 551 to a previous agreement. There was no such pressure in the transaction of 1848 as deprived Lord Henry of his own volition. He thought it worth his while to do as he did with his own, and the Court will not weigh the expectations which the appointee may have from the appointor. Appointments under family settlements are commonly made upon the faith that the property will be resettled by the child upon persons not within the scope of the power, and the strongest pressure would be used to secure compliance; but they are good or bad according as there is a completed bargain beforehand between the parent and child or not. Might not a father, appointing to his son, recommend him to make his will? The distinction is, that an agreement creates a trust in equity, and renders the whole transaction the act of the appointor who is bound by the power, but the strongest moral obligation has no such effect. *Wallgrave v. Tebbs*, (d) *Tee v. Ferris*, (e) *Lomax v. Ripley*. (g)

[THE LORD JUSTICE TURNER. — In those cases was there any trust?]

No; but they are clearly analogous. In them, as here, there was a power of disposition within certain limits, which were successfully overstepped by the use of moral influence, avoiding any actual trust.

Again, fraudulent appointments are set aside *ab initio*, but how can that be done in such cases as this? Is the appointment to be good till the influence is exercised? Or until a subsequent bad intention is formed? And what if a bad intention be afterwards abandoned?

(a) 14 Beav. 635.

(b) 23 Beav. 101.

(c) 4 Drew. 594.

(d) 2 K. & J. 813.

(e) *Ib.* 357.

(g) 3 Sm. & Giff. 48.

Secondly. There is nothing in the nature of this disposition which would have invalidated it if contained in the appointment itself. The Duke might have limited *the fund over *552 on the marriage or non-marriage of his daughter with a particular person, or upon a contingency over which neither he nor she had any control, as the execution of a will (and why not an appointment?) made by a third person. There can be only two tests of an appointment, formal execution and innocent intention. The Master of the Rolls is, we submit, in error, in considering a control over marriage as beyond the scope of the power. It is the very object of powers of this nature that the father should prevent a son from improperly entering a profession, or a daughter from contracting an imprudent marriage. *Stroud v. Norman*. (a) Here, then, is a due execution for a proper purpose, and every thing else is irrelevant.

Thirdly. The result of setting aside so much of the trust-deed of 1848 as is in excess of the power would be to leave a present interest in Lord Henry Bentinck. There is no gift at all to Lady Mary except through an invalid appointment. But in default of appointment Lord Henry takes the whole. *Carver v. Bowles*. (b)

Fourthly. At least the appointment is good as to 8000*l*. The bill does not ask for a total avoidance, and the appointments of the two sums are clearly separable both as to form and as to intention. The deed of appointment speaks of two fifth shares: and all the evidence shows that the duke would have appointed 8000*l*. to Lord Henry, if the arrangement of the other 8000*l*. had never been contemplated. Indeed he did make an appointment to Lady Harriet notwithstanding her refusal to assist him. *Daubeny v. Cockburn* (c) went upon the principle that the appointee could take no benefit from his own fraud. * Here also *553 there is no fraud upon the other objects of the power. *Alexander v. Alexander*, (d) *Sadler v. Pratt*, (e) *Rowley v. Rowley*. (g)

Mr. Giffard, Mr. T. Stevens, and Mr. Freeling, for Lady Harriet Bentinck. — Two objections are raised to the appointments to Lady Harriet; first, that they were not made with the intention of bene-

(a) Kay, 313.

(d) 2 Ves. Sen. 640.

(b) 2 R. & Myl. 304.

(e) 5 Sim. 632.

(c) 1 Meriv. 626.

(g) Kay, 242.

fiting her; secondly, that their real object, that of suspending the income, was inconsistent with the power. To these objections, however, there are three answers.

First. Communications subsequent amount to nothing, and do not derogate from appointments actually made. The appointments were made, as the Master of the Rolls has decided, for Lady Harriet's own benefit. She could do what she pleased with the money, and it would have passed to her creditors or representatives. It would still pass, for the order did not divest her property. *Smith v. Warde*. (a) There is no pretence here for saying that there was any thing like delegation. No case goes to any thing like the length contended for. In *In re Marsden's Trust*, (b) the husband was the agent of the appointor, who was responsible for his acts. Lord St. LEONARDS does not observe upon the modern cases. The Courts cannot deal with motives.

Secondly. The power authorizes an appointment of capital or income subject to conditions, &c., present or remote. Why could not the interest be accumulated? Only the enjoyment was * 554 suspended, not the vesting. * An appointment to issue would have had the effect of accumulation. Could not the duke have appointed to Lady Harriet, on condition that, if he should so direct, she should repay with accumulations to Lady Mary, and then have taken security for her so doing? The annuity deed contains a power of withholding. No appointment to one object of a power with a condition in favour of another object has ever been held fraudulent. At the most this is only like the cases of resettlement. *White v. St. Barbe*, (c) *Goldsmid v. Goldsmid*, (d) and is the very converse of *Danbeny v. Cockburn*, (e) for the arrangement is in favour of the appellant. This is not the ordinary case of a power in a settlement, for every thing shows that the donor intended to give the widest possible discretion.

Thirdly. The appointments, at all events, are not wholly void. The reason for this equitable jurisdiction is the cutting down the instrument according to equity and good conscience, which certainly do not here require that Lady Harriet should be deprived of what was ultimately intended for her.

(a) 15 Sim. 56.

(d) 2 Hare, 187.

(b) 4 Drew. 594.

(e) 1 Meriv. 626.

(c) 1 Ves. & Bea. 399.

Sir. Hugh Cairns, Mr. Hardy, and Mr. A Bailey, for the Duke of Portland. — The decree has laid down two principles, which are, we submit, not only new and unfortified by authority, but erroneous. First, according to his Honor, the frame of mind which induced a parent to exclude from distribution on the ground of an imprudent marriage would enable the Court to set aside the appointment. Secondly. There is no authority for upsetting an appointment for any thing short of a preceding agreement.

*Wellesley v. * Mornington*, (a) and other cases of that class, * 555 proceed upon the principle that the fund, coming back to the parent, is treated in his hands as unappointed. If the child, in such cases, recovered, or, in a case like the present, refused to carry into effect the scheme, could the appointment be upset? The Court does not look into motives.

THE LORD JUSTICE TURNER. — Does not the question of motive arise in acts of bankruptcy?

[THE LORD JUSTICE KNIGHT BRUCE. — And under the criminal law?]

In re Marsden's Trust (b) is the first case in which an innocent appointee has been prejudiced; and there the appointee was a minor and the wife *in extremis*, so that it was a mere fraud on both parties by the husband.

[THE LORD JUSTICE KNIGHT BRUCE. — May not the Vice-Chancellor KINDERSLEY have thought, in that case, that the authority given to the husband was equivalent to an actual communication.]

Proby v. Landor (c) [the Lord Justice TURNER referred to *Briggs v. Penny* (d)], *Carter v. Green*, (e) *Moss v. Cooper*. (g)

At all events, the appointments must stand as to one-half; for why should an appointment, clogged with an illegal condition in favour of an object of the power, be placed in a worse position than when it is in favour of a stranger.

(a) 2 K. & J. 148.

(b) 4 Drew. 594.

(c) 28 Beav. 504.

(d) 3 Mac. & G. 546.

(e) 3 K. & J. 591.

(g) 1 J. & H. 352.

[THE LORD JUSTICE KNIGHT BRUCE. — Would the appointment have been made but for the condition ?]

That is not the test. *Sadler v. Pratt*, (a) *Fisher v. Brierly*. (b) :

The Solicitor-General, in reply. — The contention is, * 556 that a device of this kind is to take * effect by making a technical division between parts of what was really one transaction. The arguments on motive depend upon a verbal fallacy. "Motive" may mean merely the determining causes, the feelings of anger and the like in the appointor's mind, (c) into which the Court, seeing a *bonâ fide* exercise of the power within its scope and intention, declines to enter. But this is totally different from the motive or purpose with which a colourable device is framed, and which is the thing meant by Lord ST. LEONARDS when he speaks of "ill-motive," (d) and well illustrated by his description of *Lord Sandwich's Case* (e) in *Keily v. Keily*, (g) where he remarks that this Court has authority to defeat such an act as a father charging a portion for his child "not because the child wants it, but because the child is delicate in health and likely to die," that is, because it is to come to some one not an object of the power. The defendants, in fact, admit, that mere bad motive is sufficient to vitiate an appointment, but they attempt to confine its effect to cases where the object is to put the property in course of coming back to the appointor, and the event is so ; cases, as they say, of moral fraud or fraud in the popular sense. There is neither principle nor authority for the distinction. Morals are not the test of appointments. The fraud which the Courts of Equity regard is fraud upon the power. Whatever is bad as a bargain is bad as a motive, provided it be motive not resting in the mind but affecting the character of the act. The cases of *Fearon v. Desbrisay*, (h) *Beere v. Hoffmister*, (i) and the like, show that the event has nothing to do with it. How could a child surviving so as to take under such a transaction as that in * 557 *Lord Sandwich's Case*, hold the * fund against the other

(a) 5 Sim. 632.

(b) 1 De G., F. & J. 648.

(c) Sugd. Pow. 618 (8th ed.).

(d) *Ib.* p. 606.

(e) Cited 11 Ves. 479.

(g) 4 Dru. & War. 38, 55, 56.

(h) 14 Beav. 635.

(i) 28 Beav. 101.

children? What can be the difference between speculating upon the chances of death and speculating on the still better chances of influence? *White v. St. Barbe* (a) and the other cases of resettlement all prove that it is by the substance and not by the form that the matter must be tested. *In re Marsden's Trust* (b) goes even further than is necessary here, inasmuch as there was nothing done under the appointment, no accession to the fraud. Three attempts have been made to explain away that case. It was argued on behalf of Lady Harriet that the child could not be allowed to take the benefit of the husband's wrongful persuasion. But it matters not whether the persuasion comes from within or without. Again, it was suggested on behalf of Lord Henry that there was a bargain between the husband and wife. But that can have nothing to do with the matter. One of your Lordships, with reference to *In re Marsden's Trust*, (b) asked whether the communication from the husband to the child might not be considered as equivalent to a contemporaneous communication. If any thing, the communication in this case was even more nearly contemporaneous. *In re Marsden's Trust* (b) is a conclusive authority which cannot be got rid of. It is said that the appointee can do what he likes, and that what he does is therefore his own proper act. But that assumes that there is a good appointment to him. It is said also that the deed of 1848 may be incorporated into the appointment, and may at all events stand as an appointment to Lord Henry. That is impossible. The duke is no party to the deed, and it lacks the requisite formalities. It can only be looked to for the purpose of discovering the purpose of the appointment. But, if otherwise, an appointment executed for an unlawful purpose cannot be maintained to any extent. * *Salmon v. Gibbs*. (c)

[THE LORD JUSTICE KNIGHT BRUCE. — A distinction was made at the bar between conditions precedent and conditions subsequent. In *Salmon v. Gibbs* the condition was subsequent.]

Stroud v. Norman (d) has no bearing on this case: it was the case of an appointment divested in favour of other objects of the power on the happening of a collateral event, and depended on the discre-

(a) 1 Ves. & Bea. 399.

(c) 3 De G. & Sm. 343.

(b) 4 Drew. 594.

(d) Kay, 813.

tion of the donee and no other person ; moreover the condition affected not the subject of the power, but other property. In *Sadler v. Pratt*, (a) it mattered not which way the point was decided. As to the second branch of the case, it is said that the arrangement was within the scope of the power, which authorized the duke to accumulate income till further order. But the Court will not alter the terms of the power or make them more arbitrary ; and even if the duke had formally directed an accumulation, which he has not done, the terms of this deed only authorize a vesting in some defined event in some one or other, and have expressly determined how long the accumulation should continue. It is useless to pretend that Lady Harriet was an independent agent in this matter. The duke's evidence, which is appealed to, cannot be accepted ; and though Lady Harriet was not told the whole truth, yet three things are quite certain, namely : that enough had passed to show the probability of her compliance ; that the intention was not solely to benefit her ; and that Mr. Ellis treated the whole matter as in substance one. It is too much to rely upon the very invalidity of the arrangement as a proof of its *bonâ fide* intention.

On the whole, to allow these appointments to stand would be to open a door not only to the fraud of the appointor upon * 559 the objects of his trust, but to the fraud * of the appointee in violating the confidence of the appointor ; and, by simply introducing a new system of conveyancing, to withdraw all appointments from the control of Courts of Equity.

Judgment reserved.

February 14.

THE LORD JUSTICE KNIGHT BRUCE. — In this cause, heard originally at the Rolls, the judgment of the Master of the Rolls on which is reported, (b) the plaintiff Lady Mary Topham, one of the daughters of the late Duke and Duchess of Portland, claims to be entitled to certain pecuniary provisions under settlements executed at different times by the late Duke of Portland, one, at least, of which was also executed by the late Duchess. And the first question in the cause is as to the title to a sum of 16,000*l.*, which, by a deed of the 13th of October, 1848, stated in the 22d paragraph

(a) 5 Sim. 632.

(b) 31 Beav. 525.

of the re-amended bill, the late Duke of Portland, in execution or exercise or as in execution or exercise of a power given or reserved to him by a settlement dated the 4th of August, 1795, appointed or professed to appoint in favour of the defendant Lord Henry Bentinck, a younger son of the late Duke and Duchess of Portland, that sum having been part of a sum of 40,000*l.* provided for the daughters and younger sons of the late Duke and Duchess of Portland by that settlement; — provided, however, subject to the power which in part at least he professed to exercise by the deed of the 13th of October, 1848, already mentioned. That instrument, and a deed of the 24th of November, 1848, executed by Lord Henry Bentinck, which is stated in the 26th paragraph of the re-amended bill, must, I think, on the evidence before the Court, be considered, so far at least as that sum of 16,000*l.* is concerned, to * have been parts of a single transaction; and the two * 560 deeds, being thus viewed, must, as I conceive, be deemed to be void in equity, so far as relates to a moiety of the 16,000*l.* professed to be appointed by one of them to Lord Henry Bentinck. The power conferred by the settlement of the 4th of August, 1795 (also stated in the bill), which the late duke professed to exercise by the deed of the 13th of October, 1848, was incapable of being delegated by him. He had a discretion as to the shares to be taken by the children, objects of the power, and as to excluding any of them in favour of any other or others of them, which discretion could be exercised only by himself; and if he had in terms appointed the 16,000*l.* to Lord Henry Bentinck and Lady Mary Topham in equal shares, with an expressed authority to the present Duke of Portland and Lord Henry Bentinck, or either of them, to deprive Lady Mary Topham in Lord Henry's favour, and make a gift to Lord Henry of the whole or any part of her share of that sum, the authority, at least, if not the whole appointment of her half, would, in my judgment, have been plainly void. Again, the plaintiff is admitted to have attained her majority before the year 1848, and does not appear to have been, between her majority and her marriage, under any disability of any kind; and I apprehend, therefore, that if, in the year 1848, her father had, as under the settlement of the 4th of August, 1795, appointed in her favour 8000*l.*, part of the 40,000*l.* settled by it, but had so appointed the 8000*l.* subject to a provision that the interest of that sum should be withheld and accumulated as the deed of the 24th of November,

1848, directs the income of the fund purporting to be affected by that deed to be withheld and accumulated, the provision, at least, if not the whole appointment as to the 8000*l.*, would have been void, as transgressing his power. But the evidence before us appears to me to establish that the deed of the 24th of * 561 November, 1848, must, as to a moiety * of the 16,000*l.*, be read and treated as if it had been incorporated in that of the 13th of October, 1848, already more than once referred to, and as if to both of them the late Duke of Portland had been a party and they had been executed by him simultaneously, though, in point of form, he was not a party to the later of the two. Thus regarding the matter, I consider that as to a moiety of the 16,000*l.* there has not been a valid appointment to any extent or of any kind, and such was the conclusion of the Master of the Rolls. His Honor thought not any portion of the 16,000*l.* well appointed, and as to this I for some time doubted. I have, however, ultimately formed an opinion that the whole of the 40,000*l.*, except that sum of 8000*l.*, has been well appointed, and that the defendant Lord Henry Bentinck is entitled for his own benefit to the other 8000*l.*, part of the 16,000*l.* ; for, according to my present view, the intention in his favour as to the latter 8000*l.* was not so connected with the wrong intention and error as to Lady Mary Topham, was not so associated with that intention or error or so dependent on it, as to be vitiated by it. The point, however, seems to me, I acknowledge, one of some difficulty.

The next question is as to the title to another sum of 16,000*l.*, that, namely, which, by an instrument of the 28th of October, 1848, mentioned in the pleadings, the late Duke of Portland in execution or exercise, or as in execution or exercise, of a power given to him by a settlement in Scotch form relating to Scotch property dated the 3d of August, 1795 (mentioned in the pleadings), also appointed in favour of Lord Henry Bentinck ;— this sum being part of a sum of 40,000*l.* or more, provided for the daughters and younger sons of the late Duke and Duchess of Portland by that settlement, — provided however subject to the power which, in part at least, he professed to exercise by the instrument of the 28th of * 562 * October, 1848, already mentioned. That instrument of the 28th of October, 1848, and the deeds of the 13th of October and 24th of November, 1848, before referred to, must, I think, on the evidence be viewed and treated as parts of a single transac-

tion ; that transaction took place in England as I collect, where, unless I mistake, each of the three deeds was prepared and executed ; and if the principles of English law ought to be considered as applicable to this question, the case of Lady Mary Topham, as to the last-mentioned sum of 16,000*l.*, is subject to the same considerations exactly or substantially, and stands exactly or substantially on the same footing as her case with respect to the first-mentioned sum of 16,000*l.* ; the instrument of the 28th of October, 1848, and the deed of the 24th of November, 1848, being, in my judgment, on that hypothesis, void in equity as to a moiety of the second sum of 16,000*l.*, for the reasons applicable also to a moiety of the first sum of 16,000*l.* Accordingly, had the English law to regulate this part of the dispute, I should hold 8000*l.* of the Scotch portions to be unappointed, and as to the rest, not exceeding 32,000*l.*, to be, in favour of others than the plaintiff, well appointed. But, as it seems to me, the rights of the parties to this contest under the Scotch settlement, the settlement namely of the 3d of August, 1795, must, to a great extent, at least, if not wholly, be governed and decided by the principles and rules of the law of Scotland ; as to which, so far as this department of the case is concerned, we ought, I think, to have recourse to evidence, or to the means afforded by the Statute 22 & 23 Vict. c. 63, unless the parties can arrange the matter for themselves.

Then comes the question as to the property settled by the deed of the 24th of June, 1843 (stated in the pleadings), and the annuity of 2720*l.* per annum, created and settled * by * 563 a deed dated in 1848, stated in the 37th paragraph of the re-amended bill. These two settlements were certainly voluntary on the part of the late Duke of Portland, — were mere matters of bounty from him. But, with great deference to the Master of the Rolls, if he thought otherwise, that circumstance appears to me not of importance. It is contended on the part of the plaintiff that the two deeds of September, 1854, and those of December, 1854, stated in the 42d, 43d, 52d and 53d paragraphs of the re-amended bill, which were executed by the present Duke of Portland under, or as under, powers conferred by the two last-mentioned settlements of 1843 and 1848 respectively, were invalid and are void as against her. And the evidence appears to me to show plainly that not one of the four instruments of September, 1854, and December, 1854, was a record of truth, was a representation of truth. The

evidence satisfies me that Lady Harriet Bentinck (one of the defendants, a daughter of the late Duke and Duchess of Portland) was not intended by the present Duke of Portland to take beneficially the whole of what any one of the four instruments purported to appoint in her favour beneficially, and that the main and governing view which he had in executing them was to enable the income, at least, of portions of the property subjected to the powers of 1843 and 1848 last mentioned, to be applied, employed or withheld in a manner not warranted by either of those powers. It was competent to the present Duke of Portland to discourage by any lawful means the marriage of Lady Mary Topham with her present husband, reasonably unobjectionable as it may have been, and possibly was; nor could it have been unlawful for the present Duke of Portland after the marriage to show practically his disapproval of it within not improper bounds. But it was not, I think, competent to him to deal, as he is, in my opinion, proved to have

* 564 * dealt, with the powers vested in him by the settlements of 1843 and 1848 last mentioned or either of them. I consider the deeds of September and December, 1854, to have been mere frauds on those powers and good for nothing. It has been contended for, or as for, Lady Harriet Bentinck, who by her counsel has been a very earnest and zealous opponent of the plaintiff on the present occasion, that there was not any privity on the part of Lady Harriet Bentinck to the view and design (an irregular view and an unjustifiable design as I conceive) with which those deeds respectively were executed, and that she understood their meaning and intention to be in accordance with their tenor. Whether if that contention had appeared to me to have a foundation in fact, I should have thought it material, I do not say; for in my judgment it had not any foundation in fact: that is to say, the evidence, as viewed by me, precludes or defeats the contention, and proves that Lady Harriet Bentinck throughout understood and knew the true intention and real object of the four deeds; was throughout well aware that not one of them was a record of truth; was throughout well aware that during the joint lives or a portion, probably considerable, of the joint lives of herself and the plaintiff a moiety of the income under the deeds was to be kept back and accumulated for reasons connected with the marriage intended before and solemnized in October, 1854, between Sir William Topham and the plaintiff. That accumulation, whether

Lady Harriet Bentinck was aware or unaware of the law, could not by law, as I understand the law, be effectually directed under either of the powers. And the deeds of September and December, 1854, were and are in my judgment void, not merely as to a moiety but as to the whole of what purports to be appointed by them respectively. For, as I conceive, the purpose of the present Duke of Portland as to those deeds was single * and entire, * 565 nor, in my opinion, ought it to be considered that he would have executed any one of the four, but for reasons connected directly with the marriage intended before and solemnized in October, 1854. The main object of the four deeds was, I think, that of operating on the plaintiff, and though in the case of Lord Henry Bentinck, as I have said, there appears to me to have been on his father's part an intention to a certain extent in Lord Henry Bentinck's favour, apart from considerations belonging merely to the disliked marriage, the case as to the appointments of September and December, 1854, seems to me materially different. I think that every part of them was and is affected by the wrong intention, to which, in my judgment, their existence is to be attributed, and that not one of them conferred any the slightest right on Lady Harriet Bentinck, the great and able exertions made on whose behalf against her sister must, I conceive, fail.

The Lord Justice TURNER stated the facts constituting the first branch of the case as set out above, and with regard to the fact appearing from Lord Henry Bentinck's evidence of the Order of the 30th of October, 1848, having been in blank when he signed it, both as to the date and as to the account to which the moneys were to be placed, his Lordship observed, that this was not, in his Lordship's opinion, material in any other point of view than as affecting the conduct of the parties, assuming that it was right to consider the order as having been signed on the 30th; for that, in the opinion of the Lord Justice, there could be no doubt that Lord Henry must be taken to have acceded to every thing which was provided for by the memorandum when completed. His Lordship then proceeded as follows:—

Under these circumstances the Master of the Rolls has held the appointment under the settlement of 1814 to be * bad * 566 as to the whole of the 16,000*l.* thereby appointed to Lord

Henry Bentinck, and this is the first point we have to consider. The appeals raise three questions as to his Honor's decision upon this appointment. First, it is contended, on the part of the plaintiff, that there is a valid appointment to her of 8000*l.*, part of the 16,000*l.* appointed to Lord Henry; and secondly, it is contended, on the part of Lord Henry, that the appointment to him is valid as to the whole of the 16,000*l.*; or thirdly, that it is at all events valid as to 8000*l.*, part of that sum.

As to the first of these points, that contended for by the plaintiff, that there is a valid appointment to her of 8000*l.*, part of the 16,000*l.*, I am of opinion that it cannot be maintained. It was argued, in support of this view, that the trust-deed ought to be read and taken as part of the appointment, and that what would be bad under the appointment so constituted ought to be rejected, and there would then be left, as it was said, a valid appointment to the plaintiff of the 8000*l.* The cases of appointments to children, accompanied or followed by settlements extending to grandchildren and others not objects of the power, and the cases of appointments with void conditions, were referred to in support of the argument; but whatever else may have been intended in this case, this, at least, is clear, that it was not intended that the trust-deed should form part of the appointment. The trust-deed was, in fact, resorted to for the very purpose of carrying into effect the object in view otherwise than by the appointment, and to unite the two together in the manner proposed would be, therefore, in truth, to constitute an appointment contrary to the intention of the donee of the power. The cases of appointment and settlement which were referred to have not, as it seems to me, any bearing upon the present case; for in those cases the intention is,

* 567 that the * children should take under the appointment, and effect is given to the settlements by the children so taking; but in this case the intention was that Lady Mary should not take under the appointment. Supposing, however, that this difficulty could be got over, and the trust-deed be read as part of the appointment, I do not think that what would be bad under the appointment so constituted could be separated. The case of *Sadler v. Pratt*, (a) which was so much relied upon on the part of Lady Mary as to this part of the case, is, I think, clearly distinguishable.

(a) 5 Sim. 682.

There was, in that case, an absolute appointment to each child, and the condition was distinct from and independent of the appointment.

Passing, then, from the question whether there is a valid appointment in favour of Lady Mary of the 8000*l.*, we come next to the point contended for on the part of Lord Henry, that the appointment to him is valid as to the whole of the 16,000*l.* That it is so upon the face of the deed there can be no doubt; but the appointment is impeached, upon the ground that the purpose appearing by the deed was not the real purpose, and that the real object was to effect a purpose which was not warranted by the power and was a fraud upon it. The first question, therefore, to be considered on this part of the case seems to me to be, What was the purpose of this appointment, and was it or was it not within the scope of the power? Now, I have already stated the evidence bearing upon this point, and looking to that evidence I think it clear, beyond all doubt, that the purpose of this appointment was not to give the whole 16,000*l.* to Lord Henry, but to subject one-half of it to the same discretionary power in the Duke of Portland for the time being as had been given to him by the deed of the 29th of June, 1843. Was this, then, a purpose warranted by * the power? I am of opinion that it was not. * 568

The absolute owner of property may, no doubt, subject the property to whatever power of appointment he may think fit, keeping, of course, within the proper limits; but the donee of a power is not the absolute owner of the property which is subject to the power. He cannot delegate the authority which is given to him. In considering his acts, regard must be had to the relation in which he stands, both towards the author of the settlement and towards the objects of the power. As to the relation in which he stands towards the author of the settlement, the purpose of the author of a settlement by which a power is created is to benefit the objects within the range of the power. If the power be exercised beyond that range his intention is that the property, the subject of the power, shall go to those who are entitled in default of appointment. As to the relation in which he stands towards the objects of the power, powers, such as those contained in the settlement by which the power in this case was created, are given to parents, upon faith of the parental relation between them and the objects of the power. They are given to enable the donees of

the power to exercise parental control over the objects of it, and to provide for their wants and necessities. The limitations in default of appointment are of themselves sufficient to show the purpose of such powers ; and if authority was wanting to support this view of them, there is Lord HARDWICKE's authority upon it. The donees of such powers, therefore, take them clothed with the parental duty. The powers are connected with the duty, and the donees can no more transfer the power than they can the duty. When, therefore, it is asked that effect may be given to an appointment which has for its object to go beyond the power, it is, in truth, asked that the unauthorized purpose of the donee may be preferred to the authorized purpose of the donor, and that to the

* 569 * prejudice of those who would be entitled but for the donee's unauthorized purpose ; and it is further asked that effect may be given to the severance of the power from the duty with which it is connected. It was attempted, however, to maintain the claim on the part of Lord Henry to the whole of the 16,000*l.*, upon the ground, that however unauthorized the purpose of the late duke may have been, and whatever fraud upon the power it may have been his intention to commit, this purpose was not communicated to Lord Henry, and he became absolute owner of the fund, and was competent to dispose of it as he pleased. But in the first place, the disposition which Lord Henry made was not, in truth, his disposition. It was upon the evidence before us the disposition of the late duke in continued prosecution of the fraud upon the power. Lord Henry, as he states, was a mere dummy in the transaction. In the second place, Lord Henry, in giving effect to this disposition, was concurring in the fraud upon the power ; and in the third place, whether Lord Henry is to be taken to have concurred in the disposition or not, his title was, at all events, derived under the fraud upon the power committed by the late duke ; and I take it to be clear, that no person, however innocent he may himself be, can, where there is no valuable consideration, derive a title under the fraud of another. *Huguenin v. Baseley.* (a)¹ This argument, therefore, on the part of Lord Henry, is founded upon a false hypothesis ; that of his having become the owner of the fund. The circumstances of the case

(a) 14 Ves. 273.

¹ See Kerr F. & M. (1st Am. ed.) 51, and cases in note (6) ; Scholefield v. Templer, 4 De G. & J. 429, and cases in note (1).

render it unnecessary for me to say what, in my opinion, would have been the result of the case, if there had been no accession on the part of Lord Henry to the fraudulent purpose of the duke, and no disposition made by him in aid of that purpose; but certainly I am * not prepared to admit, that even in that * 570 case the appointment in favour of Lord Henry could have been upheld. I am very much disposed to think that it could not. The Court sets aside appointments made by parents in favour of children where the appointments are connected with agreements by the children for the benefit of the parents. It also sets aside appointments made by parents to children, with a view to the benefit of the appointments ultimately accruing to the parents.¹ These, it may be said, and it was said in the course of the argument, are cases in which there is moral fraud; but surely the powers of Courts of Equity are not to be measured by the nature of the fraud. If such purposes were warranted by the power, it would be difficult to say that there could be fraud in so exercising it. What therefore the Court acts upon in such cases is, as I conceive, the fraud upon the power in the exercise of it by the parents for purposes foreign to those for which it was created,² and if the Court in such cases looks to the purpose with which the power was exercised, it must, as I apprehend, look to that purpose in all cases, and the question in each case must be what was the purpose with which the power was exercised, as to which there is in this case no doubt. It may not be unimportant to refer upon this subject to the case of *Scroggs v. Scroggs*. (a) In that case the consent of a trustee was necessary to the exercise of a power, and the donee of the power procured the trustee's consent by a false representation, to which the appointee does not appear to have been in any way a party; yet the Court set aside the appointment. We were much pressed in the course of the argument before us with the danger and inconvenience which may be attendant upon examining into the motives by which the donees of powers may * have been influenced in the exercise of them, and * 571 I agree that there would be both danger and inconvenience such an examination; but it is one thing to examine into the purpose with which an act is done, and another thing to examine

(a) Amb. 272.

¹ See Kerr F. & M. (1st Am. ed.) 268, 269.

² See Kerr F. & M. (1st Am. ed.) 271, 272.

into the motives which led to that purpose; and what we have to do in this case is, to look to the purpose of the act which was done, and not to the motive which led to it. Whether the late duke was right or wrong in the objection which he had to Lady Mary's proposed marriage, and which led to the appointment under consideration, is a question which I do not think it is competent to this Court to entertain, and which I desire to be understood as having wholly disregarded. My judgment rests upon the ground, that whether the motive was right or wrong, the course adopted for giving effect to it was not warranted by the power. For the above reasons, I fully agree in the opinion of the Master of the Rolls, that Lord Henry's claim to the whole of the 16,000*l.* under this appointment cannot be maintained.

I may add, that there are other views of this appointment which seem to me to be equally fatal to it as to 8000*l.* First. That to that extent the purpose having been not to give to Lord Henry, but to suspend the beneficial enjoyment and accumulation with a view to a future appointment, and no future appointment having been made, the accumulated fund would, as I apprehend, go as in default of appointment; and secondly, that although, the rights of the parties entitled in default of appointment may of course be defeated by an exercise of the power, they can be defeated only by a *bond fide* and not by a merely formal execution of it; and that in this case there was a mere formal execution of the power. His

Honor however has held this appointment to be bad as to * 572 the whole of the 16,000*l.*, upon the general rule, * that

where an appointment is made for a bad purpose, the bad purpose affects the whole appointment, and his Honor has relied upon *Daubeny v. Cockburn*, (a) in support of this view. That this general rule is correct when applied to cases in which the evidence does not enable the Court to distinguish what is attributable to an authorized from what is attributable to an unauthorized purpose, I feel no doubt; but if the evidence enables the Court to make this distinction, the foundation on which the rule rests, the impossibility of distinguishing what is attributable to one purpose from what is attributable to another, wholly fails; and the general rule therefore, cannot, as it seems to me, apply. Sir WILLIAM GRANT has, I think, in *Daubeny v. Cockburn*, pointed to this view;

(a) 1 Meriv. 626.

for he said that he could not collect from the evidence, that but for the assent of the daughter, any appointment would have been executed in her favour. Now, the evidence in this case satisfies me that one of the purposes of this appointment was, that Lady Charlotte Denison, Lady Howard de Walden, Lord Henry Bentinck, and Lady Harriet Bentinck, should all be placed upon the same footing, each taking 8000*l.*, and I find myself therefore reluctantly compelled to dissent from the Master of the Rolls' opinion, that this appointment is bad as to the whole of the 16,000*l.* appointed to Lord Henry. The conclusion at which I have arrived as to this appointment is, that Lord Henry is entitled to 8000*l.* under it, and that it is bad only to the extent of 8000*l.*

The case being thus disposed of as to the appointment made by the late Duke of Portland of the 16,000*l.*, we have next to consider other appointments made by the defendant the present Duke of Portland.

[* His Lordship then stated the facts constituting the * 573 second branch of the case, as set out above, and proceeded as follows:] —

These appointments and those of September, 1854, seem to me to be open to the same objections as the appointment in favour of Lord Henry, on which I have already commented. There is the same intention to put the appointed fund under a control not authorized by the power, that of Lady Harriet; the same accession on her part to that purpose; the same intention to accumulate and suspend the enjoyment; the same resort to a mere contrivance to effect those objects; and the same absence of *bona fides*; and having already stated my views upon those points it is unnecessary for me to say more upon them. The Master of the Rolls, however, has held these appointments to be valid, upon the ground, as I collect from the judgment, that they were made for the purpose of carrying into effect the intentions of the late duke, the author of the powers, expressed in the deeds by which the powers were created. But with all deference to the Master of the Rolls, the intentions of the late duke are to be collected only from the deeds which he executed; and after the execution of those deeds both he and the donees of the powers created by him were as much bound to keep within the limits of the powers as they would have been if

those powers had been created by any other person. The case of *Daubeny v. Cockburn* (a) has settled that point. These appointments therefore are, in my opinion, clearly bad as to a moiety of the appointed income. It is perhaps open to more doubt whether they are or are not bad *in toto*, but there was not, as to these

appointments, as there was in the case of Lord Henry, any
 * 574 intention of benefiting Lady * Harriet to any definite extent.

The appointments could not have been made for the purpose of giving her a moiety of the income, for she would have been entitled to it under the limitations in default of appointment if no such appointments had been made. They were made, as I am satisfied upon the evidence, for the sole purpose of defeating the limitations in default of appointment by a fraudulent exercise of the power, and I am of opinion, therefore, that these appointments are wholly void. *Daubeny v. Cockburn*, which the Master of the Rolls has (though in my humble judgment erroneously) applied to the case of the appointment in favour of Lord Henry, seems to me to apply directly to these appointments in favour of Lady Harriet.

As to the appointment affecting the 40,000*l.* charged upon the Scotch estates, I say no more than that the Scotch law being a question of fact I do not think that we can properly come to any decision upon it in the absence of evidence or of the opinion of a Scotch Court.

May 2.

Their Lordships' order, as drawn up, was in the following terms:—

This cause coming on, &c., to be heard before their Lordships on the petition of rehearing by way of appeal on, &c., preferred by the plaintiff, and on the petition of rehearing by way of appeal on, &c., preferred by the defendant Lord Henry Cavendish Bentinck, in the presence of counsel for the appellant on the first appeal, and for the defendants and for the appellant of the second appeal, and for the plaintiff and remaining defendants: upon hearing the decree made by the Right Honorable the Master of the Rolls, dated, &c., their Lordships did order, that this
 * 575 cause should * stand for judgment; and this cause, standing the, &c., and this day for judgment on the said petitions of rehearing by way of appeal in the presence of counsel on

(a) 1 Meriv. 626.

both sides, their Lordships do order that the decree made in this cause by the Master of the Rolls, dated the 22d day of July, 1862, be discharged. And their Lordships do declare that the appointment made by the deed-poll of the 13th day of October, 1848, in the pleadings mentioned, is void so far as relates to the sum of 8000*l.*, part of the sum of 16,000*l.* thereby appointed to the defendant Lord Henry Cavendish Bentinck, and that the said sum of 8000*l.* is distributable under the trusts of the indentures of settlement of the 4th day of August, 1795, and the 8th day of June, 1814, in the pleadings respectively mentioned as in default of appointment. And the defendant the Duke of Portland, by his counsel, waiving his right, if any, to a share in the said sum of 8000*l.*, as having been formerly one of the younger children of the late Duke and Duchess of Portland, and the defendants, by their counsel, consenting that the estates of the late Duke of Portland and Lady Caroline Bentinck deceased, and Lord George Bentinck deceased, shall be deemed to be represented for the purposes of this suit by the defendant the Duke of Portland, their Lordships do declare that the plaintiff became entitled on the 27th day of March, 1854, the day of the death of the late Duke of Portland, to the sum of 2666*l.* 13*s.* 4*d.*, being one-third part of the said sum of 8000*l.*, and that the defendant the Duke of Portland, as the legal personal representative of Lord George Bentinck deceased, became entitled at the same time to the like sum of 2666*l.* 13*s.* 4*d.*, being a further third part of the said sum of 8000*l.*; and that the legal personal representatives of Lady Caroline Bentinck deceased became entitled at the same time to the like sum of 2666*l.* 13*s.* 4*d.*, being the remaining third part of the * said * 576 sum of 8000*l.* And it appearing that the said sum of 8000*l.* was paid by the said late Duke of Portland out of his own moneys, and was, with a like sum of 8000*l.*, also part of his own moneys, invested on the 31st day of October, 1848, in the purchase of 18,686*l.* 2*s.* 8*d.* 3*l.* 10*s.* per cent annuities, now new 3*l.* per cent annuities, in the name of the said Duke of Portland and the defendant Charles Heaton Ellis, to be held by them upon the trusts of a settlement dated the 24th day of November, 1848, in the pleadings mentioned, and by virtue whereof the dividends of the said sum of 18,686*l.* 2*s.* 8*d.* new 3*l.* per cent annuities have been accumulated up to the present time, their Lordships do declare, that the said settlement of the 24th day of November,

1848, is void so far as relates to one moiety of the said 18,686*l.* 2*s.* 8*d.* new 3*l.* per cent annuities and the accumulations thereof. And it is ordered, that the defendants the Duke of Portland and Charles Heaton Ellis do, on or before the 1st day of June, 1863, raise by sale of a sufficient part of the said moiety of the said 18,686*l.* 2*s.* 8*d.* new 3*l.* per cent annuities, and of the said moiety of the said accumulations thereof, the said three several sums of 2666*l.* 13*s.* 4*d.* and the three several sums of 942*l.* 14*s.* 1*d.* next hereinafter mentioned, amounting together to the sum of 2828*l.* 2*s.* 3*d.*; and that the defendants the Duke of Portland and Charles Heaton Ellis do thereout, on or before the 1st day of June, 1863, pay one of such sums of 2666*l.* 13*s.* 4*d.* to the defendant John James, as trustee of the indenture of settlement of the 5th day of October, 1854, in the pleadings mentioned, and pay to the plaintiff, on her separate receipt, one of the said sums of 942*l.* 14*s.* 1*d.*, being the amount of the interest thereon at the rate of 4*l.* per cent per annum from the 27th day of March, 1854,

to the first day of June, 1863, and pay to the said Duke * 577 of Portland, as the legal personal representative of * the said Lord George Bentinck deceased, one other of the said sums of 2666*l.* 13*s.* 4*d.*, and one other of the said sums of 942*l.* 14*s.* 1*d.*, being interest thereon at the rate and from and to the time aforesaid, and to pay the legal personal representative of the said Lady Caroline Bentinck deceased the remaining sum of 2666*l.* 13*s.* 4*d.*, and the remaining sum of 942*l.* 14*s.* 1*d.*, being interest thereon at the rate and from and to the time aforesaid. And it is ordered, that the defendants the Duke of Portland and Charles Heaton Ellis do, on or before the 1st day of June, 1863, transfer the residue, if any, of the said moiety of the said 18,686*l.* 2*s.* 8*d.* new 3*l.* per cent annuities, and of the said moiety of the said accumulations, to the legal personal representatives of the late Duke of Portland deceased. And it is ordered, that upon such payment of the said sum of 8000*l.* and interest the benefit of the charge thereof on the estate charged therewith is to be transferred to the legal personal representative of the late Duke of Portland as part of his personal estate. And their Lordships do declare,¹ that the two appointments in the pleadings mentioned,

¹ This decree was varied, in the House of Lords on appeal, by the introduction, at this place, of the words, "without prejudice to any question as to any future exercise of the powers of appointment." 11 H. L. Cas. 61.

both dated the 21st day of September, 1854, the one being of the annuity of 2720*l.*, and the other being of the dividends, interest, and annual produce of the 52,000*l.* bank 3*l.* per cent annuities, and of the accumulations of the last-mentioned sum made during the life of the late Duke of Portland, and also the two appointments in the pleadings mentioned, both dated the 19th day of December, 1854, the one being of the said annuity, and the other being of the said interest, dividends, and annual produce, are void; and that the plaintiff and the defendant Lady Harriet Cavendish Bentinck are entitled in equal shares to the said annuity of 2720*l.*, and to the said interest, dividends, and annual produce from the said 27th day of March, 1854.

And it appearing * that there has been paid to the plaintiff * 578 the sum of 717*l.* 7*s.* 4*d.* and 820*l.* 3*s.* 4*d.*, making together the sum of 1037*l.* 10*s.* 8*d.*, in respect of her moiety of the said annuity, and interest, dividends, and annual produce; and that, with the exception of the said sum, the whole of the said annuity, and of the said interest, dividends, and annual produce has been paid to the said Lady Harriet Cavendish Bentinck since the said 27th day of March, 1854; and that, with the exception of the said sum of 1037*l.* 10*s.* 8*d.* so paid to the plaintiff, and of certain other sums, amounting together to the sum of 3311*l.* 0*s.* 9*d.*, the whole of one moiety of the said annuity, and of the said interest, dividends, and annual produce that have accrued due from the said 27th day of March, 1854, has been invested in bank 3*l.* per cent. annuities in the names of the Duke of Portland, Lord Henry Bentinck and Lady Harriet Cavendish Bentinck, and the income thereof accumulated by like investments; and that the said bank annuities amount together to 22,710*l.* 18*s.* 8*d.* bank 3*l.* per cent annuities, it is ordered, that the defendants the Duke of Portland, Lord Henry Cavendish Bentinck and Lady Harriet Cavendish Bentinck do, on or before the 1st day of June, 1863, sell the said 22,710*l.* 18*s.* 8*d.* bank 3*l.* per cent annuities, and pay the produce thereof to the plaintiff Lady Mary Elizabeth Topham, the wife of the defendant Sir William Topham, on her separate receipt. And it is ordered, that the defendant Lady Harriet Cavendish Bentinck do, on or before the said 1st day of June, 1863, pay to the said plaintiff, on her separate receipt, the said sum of 3311*l.* 0*s.* 9*d.* cash. And it is ordered, that a case be prepared by the plaintiff for the opinion of the Court of Session, being the Superior Court

of Scotland, as to the validity, according to the law of Scotland, of the appointment made by the deed of the * 28th day of October, 1848, in the pleadings mentioned, so far as relates to the sum of 16,000*l.* appointed to the defendant Lord Henry Cavendish Bentinck, or any and what parts of such sum of 16,000*l.*; and if invalid, as to the sum or sums payable by reason of such invalidity, and the person or persons entitled thereto. And such case, when so prepared, is to be submitted by the plaintiff to the others of the parties to this cause who are interested therein, and such case is afterwards to be submitted to their Lordships for their approval and settlement; and any of the parties interested are to be at liberty to apply to their Lordships, in order that it may be so approved and settled; and such case, when finally approved and settled by their Lordships, is to be remitted to the said Court for its opinion as to the law of Scotland as applicable to the facts to be set forth in such case on the questions to be therein submitted to such Court. And it is ordered, that the further hearing of these appeals, so far as relates to the appointment of the 28th day of October, 1848, in the pleadings mentioned, and to the costs of this suit, and of these rehearings by way of appeal, do stand adjourned until after an opinion on such case shall have been given. (a)

June 20.

On this day upon a motion made by counsel for the defendant Lady Harriet, it was ordered, that she, by her counsel, undertaking to lodge her case, and to set down her appeal to the House of Lords against the order of the Lords Justices for hearing during the then present session of Parliament, if the House of Lords should permit the same to be so set down, the plaintiff by * 580 her counsel * undertaking to consent, if necessary, to any application that might be made to the House of Lords by the defendants for that purpose, that, notwithstanding the said order, the defendants the Duke of Portland, Lord Henry and Lady Harriet should, on or before the 20th of July, 1863, or within seven days after service of the present order on them, transfer into Court in trust in the cause the 22,710*l.* 18*s.* 8*d.* bank 3*l.* per cent annuities in the said order mentioned; and that the defend-

(a) Reg. Lib. 1863, B. 969.

ant Lady Harriet should, within the time aforesaid, pay into Court to the credit of the cause the 3311*l.* 0*s.* 9*d.* cash therein also mentioned. And it was ordered, that the same when so paid into the bank should be laid out in the name of the Accountant-General in the purchase of bank 3*l.* per cent annuities in trust in the cause, and that the interest from time to time to accrue on the annuities so to be purchased, and on the bank annuities so to be transferred, should be as the same accrued due paid to the plaintiff upon her separate receipt until further order, with liberty to the plaintiff to apply to reinvest the whole of the said bank annuities respectively or any part thereof in other securities. And it was ordered, that the defendant Lady Harriet should pay to the next friend of the plaintiff, and to the defendants the Duke of Portland and Lord Henry, their costs of the application. (a)

August 1.

The cause stood in their Lordships' paper on this day in order that the case directed by the Order of the 2d of May, 1863, to be prepared by the plaintiff for the opinion of the Court of Session of Scotland might be * approved and settled by their * 581 Lordships, when it was, at the request of the plaintiff, and by consent of the defendants, and with the sanction of the Court, arranged that all further proceedings should be stayed under so much of that order as directed that a case should be prepared by the plaintiff for the opinion of the Court of Session as to the validity, according to the law of Scotland, of the appointment made by the deed of the 28th of October, 1848, so far as related to the 16,000*l.* appointed to the defendant Lord Henry, or any and what parts of that sum, and if invalid as to the sum or sums payable by reason of such invalidity and the person or persons entitled thereto; and that such case when so prepared should be submitted by the plaintiff to the others of the parties to the cause who were interested therein, and that such case should afterwards be submitted to their Lordships for their approval and settlement; and that any of the parties interested should be at liberty to apply to their Lordships in order that it might be so approved and settled; and that such case, when finally settled and approved by their Lordships, should be remitted to the Court of Session for its opinion as to the law of Scotland as appli-

(a) Reg. Lib. 1863, B. 1427.

cable to the facts to be set forth in such case on the questions to be thereby submitted to such Court. And at the like request to the plaintiff, and by the like consent of the defendants, and with the like sanction, it was then also arranged, that notwithstanding the direction contained in the Order of the 2d of May, 1863, that the further hearing of the appeal, so far as related to the appointment of the 28th day of October, 1848, and to the costs of this suit, and of the rehearings by way of appeal, should stand adjourned until after an opinion on such case should have been given, the cause should be at once disposed of as to the question of * 582 costs reserved by the Order of the * 2d of May, 1863, and that the cause should stand for judgment as to the question of costs. (a)

December 5.

The cause accordingly stood this day for judgment on the question of costs reserved by the Order of the 2d of May, 1863, when their Lordships delivered the following judgments: —

THE LORD JUSTICE TURNER. — The only question remaining to be disposed of in this case is the question of costs.

I have again read through and considered the pleadings and the evidence in the cause with a view to this question. There are two branches of the case, one relating to the appointments made by the late duke, the other to the appointments made by the defendant the present duke. We have held all these appointments to be void, so far as the plaintiff is concerned, as being in fraud of the powers under which they were made, — fraudulent in the eye of this Court, without reference to the question whether they were morally so or not.

In this state of circumstances, I think that, so far as the suit relates to the appointments made by the defendant the Duke of Portland, the plaintiff is clearly entitled to the costs against him, and I think she is also entitled to this portion of the costs against the defendants Lord Henry Bentinck and Lady Harriet Bentinck; it appearing by the answer of Lord Henry, as I read it, that he was concurring in these appointments being made, and * 583 by the answer of Lady Harriet that she also * has concurred in giving effect to these appointments and claims under them, in opposition to the plaintiff.

(a) See Reg. Lib. 1863, B. 2437.

As to the rest of the plaintiff's costs of the suit, those relating to the appointments made by the late Duke of Portland, I am of opinion that they ought to be paid out of the estate of the late Duke of Portland; and the defendant the Duke of Portland having undertaken to represent that estate in this suit, I think there must be an order for the payment of this portion of the costs accordingly; but looking to the answers and cross-examinations of the defendant the Duke of Portland and of Lord Henry, I think that it would be going too far to throw this portion of the costs upon either of them personally, nor do I think they can be thrown on Mr. Ellis, who was a mere agent of the late duke in this transaction.

I think neither the defendant James nor the defendant Sir William Topham can have any costs as against the other defendants through the medium of the plaintiff. They have become necessary parties as defendants only in consequence of the settlement made upon the plaintiff's marriage, and must take their costs out of the settlement funds. It would be unjust that the parties should be charged with double costs by reason of that settlement.

None of the other defendants have, in my opinion, any claim to costs as against their co-defendants.

What has been said relates to the costs of the suit generally. I think there should be no costs of either of the appeals.

* THE LORD JUSTICE KNIGHT BRUCE. — Continuing to take * 584 the view of the merits of this case as affected by the English Law, which I stated on a former occasion, I concur in what the Lord Justice now proposes. I had, however, for some time doubted whether the introduction by the plaintiff into this suit of those matters which we hold to be cognizable by the law of Scotland ought not to have the effect of diminishing the amount of costs to be awarded to her. But the operations set on foot against her with regard to both the Scotch and English funds, operations which, as to the English funds at least, were, in my judgment, I repeat, highly irregular and unjust, appear to have belonged to one scheme, and she was, I think, justified in bringing, and entitled, if not bound to bring, the whole narrative before the Court. (a)

(a) Their Lordships' order on this part of the case will be found in Reg. Lib. 1863, B. 2437.

NOTE. — This decision was affirmed by the House of Lords on the 7th of April, 1864. [11 H. L. Cas. 32.]

1863. June 9. Before the LORDS JUSTICES.

A debtor conveyed property to a trustee upon trust to sell and pay to the encumbrancers (who were parties) and to the creditors parties thereto of the twelfth part, the sums due to them, but so that the trustees might apply the moneys from time to time in paying wholly or partially any one or more of the creditors in preference to any others; and it was declared that nothing contained in the deed should charge the property with any of the debts the payment of which was thereby intended to be provided for, or give to the creditors (other than the encumbrancers) any right of action or suit, lien, charge or demand on account of any such debt upon or against the property, the debtor, or the trustee. C., a creditor, who was not an encumbrancer, executed the deed and received under it a payment on account of his debt. *Held*, reversing the decision of the Court below, that C. could maintain a suit for the execution of the trusts of the deed.¹

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor WOOD dismissing his bill with costs.

The plaintiff was a simple contract creditor of William Harris, and his bill was filed to enforce the trusts of a deed executed by Harris. This deed was executed in April, 1855, but was erroneously dated the 3d of April, 1853, and was expressed to be made between W. Harris of the first part, several persons therein named (being encumbrancers on leasehold properties of Harris) of the next nine parts, Joseph Radford of the eleventh part, and the several other persons whose names and seals were thereunto respectively subscribed and set, being creditors of W. Harris, of the twelfth part; and thereby, after long recitals showing the particulars of various leasehold properties to which Harris was entitled and of the encumbrances upon them, and the amounts due on such encumbrances to the parties of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth parts respectively; and reciting that W. Harris was further indebted to the several persons mentioned in the schedule thereunder written or thereunto annexed in the several sums of money set opposite to their respective names in the said schedule; and reciting that divers of the encumbrancers and creditors parties thereto had required W. Harris to make some provision for the payment and dis-

¹ See *post*, 593, and cases in note.

charge of the principal moneys and interest so due from the said W. Harris to the said encumbrancers and the several persons parties thereto of the twelfth part respectively, being creditors of the said W. Harris, which the said W. Harris had accordingly agreed to do on the said several encumbrancers or some of them agreeing to forbear for such time as was thereafter mentioned: Harris by the deed demised his leasehold properties to Radford for all the residue of the terms for which he held them wanting the last day, subject to all under-leases and agreements for under-leases, and to the encumbrances, upon trust for sale. It was declared that Radford, his executors, administrators, and assigns should stand possessed of the moneys arising from the sale, and of the rents until sale, upon trust to pay all costs, charges and expenses of preparing, engrossing and executing the trust-deed, and all other costs, charges, and expenses of and incident to the execution of the powers thereby created, and in case the premises should, with the consent of the encumbrancer or encumbrancers thereon, be sold discharged from the encumbrance or encumbrances, should pay and discharge the principal money and interest which at the time or respective times of such sale should be charged on the premises so sold, and according to the priorities of such encumbrances respectively; and should in the next place pay to the several persons parties to the deed of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and twelfth parts, their several and respective executors, administrators, and assigns, the several sums of money and interest which might then remain due and owing to them respectively, yet so nevertheless that Radford, his executors, administrators, and assigns should have full discretionary power and authority to apply the said * moneys or any part thereof * 587 from time to time in paying and satisfying either wholly or partially any one or more of the said creditors the amount of his, her, or their debt or debts, in preference or priority to any other or others of the said creditors. And it was declared that when and so soon as all the debts or sums of money for the payment and satisfaction whereof provision was intended to be thereby made should have been fully paid and discharged, and all the trusts thereinbefore declared should have been fully performed and satisfied, and all costs, charges, and expenses which Radford or other the trustees or trustee for the time being, their executors or administrators, should incur or become liable to, should be fully discharged,

the deed and the demise intended to be thereby made should become absolutely void, and the said thereby demised premises should immediately thereupon be vested in and become the absolute property at law and in equity of the said W. Harris, his executors, administrators, and assigns for all the then unexpired residues of the respective terms and interests therein. And it was declared that nothing therein contained should operate or extend to subject, charge or make liable the said thereby demised premises to or with any debt or debts the payment whereof was intended to be thereby provided for, or to give to the person or persons to whom any such debt or debts as aforesaid was or were due or owing (other than and except the several persons parties thereto of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth parts respectively, his or their executors or administrators) any right of action or suit, or any lien, charge, or demand whatsoever at law or in equity on account of any such debt upon or against the said thereby demised premises respectively, or the said W. Harris, his executors or administrators, or Radford, or other the trustees or trustee

for the time being; but that the deed should not in any * 588 manner affect, alter, or abridge the * rights and remedies of the said parties thereto of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth parts respectively under the severally thereinbefore recited securities, or any deeds or securities which they respectively might then hold. Then followed a proviso authorizing the trustee to complete unfinished buildings and insure against fire. And it was declared that it should be lawful for the trustees or trustee to compromise or compound any action, suit, proceeding, difference, dispute, claim, or demand relating to the said several debts or sums so as aforesaid due or owing from or by the said W. Harris, or otherwise relating to the said trust premises or any part thereof, upon any terms which he or they should think proper, and to refer any such difference, dispute, claim, or demand to arbitration, and to do all acts and execute all instruments expedient for such purposes; and, in all cases in which any question of law or equity should arise in relation to all or any of the said trust premises, to settle and arrange the same in such manner as should be advised by his or their counsel; and to adjust, settle, and approve all accounts in relation to all or any of the said trust premises, and generally to compromise, settle and adjust all claims, demands, accounts, and questions relating to or affect-

ing or arising as to all or any of the said trust premises, and to execute and do all releases and things in relation to all or any of the said trust premises, as fully and absolutely to all intents as Radford, his executors or assigns, or the trustees or trustee for the time being, could do if he or they were or was the absolute owner or owners of the said trust premises. The deed contained a power of appointing new trustees, and concluded with several covenants by the persons parties thereto of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and twelfth parts, not to take any proceedings against Harris in respect of any of their * debts till the 1st of July then next, and a stipulation that * 589 the deed should be binding on the parties who executed, though any others of the persons made parties to it might not execute it.

This deed was executed by Harris Radford, and two only of the encumbrancers, and by four simple contract creditors, of whom Andrew Cosser, who claimed to be a creditor of Harris for 300*l.*, was one. On the 12th of February, 1859, Radford paid Cosser 50*l.* on account of his debt.

On the 18th of February, 1862, Harris was adjudged bankrupt. Thomas James Boys was chosen his assignee.

In June, 1862, Radford filed his bill against Boys as the sole defendant, praying that he, Radford, might be discharged from the trusts, and that the trusts, so far as they were unperformed, might be administered by the Court, the plaintiff submitting to account as the Court might direct.

In July, 1862, Cosser filed his bill, on behalf of himself and all the other creditors entitled to the benefit of the trust-deed, against Radford and Boys, praying for the usual accounts against Radford, and for the execution of the trusts under the direction of the Court.

The causes came on at the same time on motion for decree before Vice-Chancellor WOOD, who was of opinion that, upon the construction of the deed, a simple contract creditor did not acquire under it the rights of a *cestui que trust*. His Honor accordingly made one order dismissing with costs Cosser's bill and directing accounts and inquiries in Radford's suit.

* Cosser now appealed from so much of the decree as * 590 applied to his suit.

Mr. Schomberg and Mr. Surrage, for the appellant. — The Vice-
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Chancellor held that the deed gave the trustee a power of excluding any creditor. We submit that it did not, but only gave a power of preference. The clause as to rights of action and suit is not intended to exempt the trustee from rendering an account; the power to compromise shows this. A provision exempting a trustee from rendering an account would be contrary to public policy. The clause as to debts not being a lien on the property appears to be against us, but it merely means that the creditors are to have no rights against the property except the qualified rights given them by the deed, and thereby made subject to the discretion of the trustee. The fact of the trustee's having filed a bill for the execution of the trusts, precludes his saying that he is under no liability to account, or that he retains his right of preferring one creditor to another. As to the cases relied on below; in *Wain v. Lord Egmont*, (a) according to the terms of the deed no person could claim the benefit of it, or be allowed to execute it till the trustees had given him a debenture or certificate of his being a creditor, and the decision only was that persons not having such debentures could not take. *Drever v. Mawdsley* (b) is the same case. In *Joel v. Mills* (c) the trust was to raise a sum of money and pay such of the debts of the testator's nephew as the trustees should think fit. The creditors were mere volunteers, not being creditors of the person creating the trust. None of these cases, therefore, apply to the present. If the contract purports to exclude us from calling the trustees to account, such a provision is contrary to public policy, * and the Court will disregard it. The Court cannot allow such a monstrous thing as a trustee subject to no liability to account.

Mr. Rolt and Mr. W. H. Terrell, for Radford. — Either there is here a power in the trustee to refuse to allow a creditor to become a *cestui que trust*, or the case is a peculiar form of *Garrard v. Lord Lauderdale*. (d) The settlor placed the property in the hands of a trustee who was to hold it in trust to pay the encumbrancers, but, subject to that, was only an agent employed by the debtor to pay his debts, not a trustee for the creditors. If a deed is so framed as *prima facie* to import a trust for the benefit of creditors, they, upon acceding to it, become *cestuis que trust*; but if the deed

(a) 3 Myl. & K. 445.

(c) 3 K. & J. 458.

(b) 16 Sim. 511.

(d) 3 Sim. 1.

contains a condition that a simple contract creditor shall not be a *cestui que trust*, he cannot become one by acceding to it. There is nothing repugnant nor any thing against public policy in this; it is not giving a man a right and saying that he shall not sue, but it is declaring that he shall not have the right. The mere execution of such a deed does not make a simple contract creditor a *cestui que trust*; what is there against public policy or inconsistent in saying that his abstaining from suing in consequence of the deed shall not make him one? He is not defrauded, for the deed tells him he is not to be a *cestui que trust*. There is nothing against law in making the determination of the trustee a condition precedent to ranking as a *cestui que trust*, so as to be entitled to bring a suit. A mere agreement to refer disputes to arbitration does not oust the jurisdiction of the Courts, but a stipulation making the award of an arbitrator a condition precedent to the right to sue is binding. *Scott v. Avery.* (a) Even admitting that upon the true construction of the deed a right is given without a remedy, * there is no reason why a person should not be * 592 allowed to accept a right subject to a condition that he shall have no remedy for enforcing it.

Mr. Roberts, for Boys, referred to *Cooke v. Turner.* (b)

Mr. Schomberg, in reply.

THE LORD JUSTICE KNIGHT BRUCE.—I respectfully dissent from the construction which one of our most eminent Judges has put on this instrument, so extraordinary, so elaborate, and so singularly worded, that it is not surprising that any two minds should differ upon it. I consider that the trustee was not, upon the true construction of the instrument, invested with a power of excluding any of the creditors. He had a power of preferring one to another in the fair and honest exercise of his discretion,¹ but he had not, in my judgment, any power to hand over any thing to the author of the trust till all the debts were paid.² It is contended that the

(a) 5 H. L. Cas. 811. (b) 14 Sim. 218, 493; 15 M. & W. 727.

¹ See *Wakeman v. Grover*, 4 Paige, 24; 11 Wend. 187; *Hudson v. Mare*, 8 Scam. 579; *Lewin Trusts* (5th Eng. ed.), 390, 391; *Perry Trusts*, §§ 585, 586; 2 Kent, 532, and cases in note (c).

* See *Perry Trusts*, § 591.

deed gave the simple-contract creditors no rights against the property or the trustee; that the trust, which in that case would be no trust, was voluntary; and that if the trustee should decline to execute the trust there would be no remedy against him in a Court of justice. I am of opinion that such a construction of the deed is inadmissible. It would be contrary to reason and authority to hold that a trustee can be at liberty to commit breaches of trust without rendering himself amenable to any Court of justice, and I do not consider the Vice-Chancellor to have entertained any such view. He appears to have proceeded on the ground that

* 593 Mr. Cosser was not a *cestui que trust*, — a view from which, as I have said, I respectfully dissent.

THE LORD JUSTICE TURNER. — With all deference to the Vice-Chancellor, whose judgment is always entitled to the highest consideration, I am unable to agree in his conclusion. His decision must rest on this, — that the plaintiff was not a *cestui que trust* under the deed. Two arguments have been urged in support of this view: first, that the case comes within the range of *Garrard v. Lord Lauderdale*; and that, although a binding trust was created as between the debtor and the encumbrancers, none was created as between the debtor and the creditors, parties of the twelfth part. No doubt a deed declaring a trust in favour of creditors may make the trustee in the first instance only an agent of the debtor; but according to *Garrard v. Lord Lauderdale* and *Wallwyn v. Coutts*, if the creditors act upon the deed, it becomes binding, and creates a trust in their favour, which they can enforce. Here the deed was acted upon, and the trustee paid Mr. Cosser 50*l.* on account of his debt. If, therefore, the principles of *Garrard v. Lord Lauderdale* are applicable to the present deed, there is a clear answer to the argument which the appellants found on that case.¹

But it is said that, although the first part of the deed declares a trust in favour of all the creditors, this is controlled by a subsequent declaration that none of the creditors, other than the encum-

¹ See *Harland v. Binks*, 15 Q. B. 713, and note at the end of the case in the Amer. ed.; *Nicholson v. Tutin*, 2 K. & J. 18; *Lewin Trusts* (5th Eng. ed.), 385; *La Touche v. Lucan*, 7 Cl. & Fin. 772, 792; *Whitmore v. Turquand*, 3 De G., F. & J. 107, note (1); *Forbes v. Simond*, 4 De G., M. & G. 298; *Simmonds v. Palles*, 2 Jo. & Lat. 495, 504; *Siggers v. Evans*, 5 El. & Bl. 367; 2 Kent (11th ed.), 533, and cases in notes; *Perry Trusts*, § 593.

brancers, are to be *cestuis que trust*. Now the first trust of the purchase-moneys clearly is for the payment of all the debts; then follows a provision giving the trustee a power of selection, but no power of exclusion. That there was no power of exclusion is made, if possible, still more manifest by the * terms of the * 594 ultimate trust in favour of Harris, which was not to arise until all the debts for payment of which provision was made by the deed had been paid. It was argued upon this that the debts intended to be provided for were only the encumbrances and such of the debts due to the other creditors as the trustee should think fit to pay; but this argument cannot be maintained if, under the first trust, the trustee was bound to pay all, and it appears to me clear that such was the intention.

Then it was said that the succeeding clause expressly excludes the creditors from being *cestuis que trust*, and overrides the preceding clauses. Now if the first trust is clear, it cannot be controlled, except by something equally clear. The meaning of the clause relied on probably was, that nothing in the deed should give the creditors any new right against the trustee or the debtor personally, not that the creditors should have no right of suing the trustee for the purpose of enforcing the execution of the trusts. It is enough, however, to say that this clause is not clear enough to defeat the clearly expressed trust which precedes it. I am of opinion, therefore, that a decree for the administration of the trusts ought to be made in the suit of *Cosser v. Radford* as well as in the other suit.

Reg. Lib. 1863, B. fol. 1455.

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1863. June 10, 11. Before the LORDS JUSTICES.

A debt being payable by instalments, with interest, the debtor made default in payment of one of the instalments. By a deed, reciting that the creditor had agreed to give the debtor time upon having the payment of the debt secured to him, with interest, "by the instalments and in manner therein-after appearing," provision was made for payment of the debt, with interest, by instalments different from the former ones, with a proviso that upon default being made in payment of any instalment the whole unpaid portion of the debt, with interest, should become immediately payable. The debtor made default. *Held*, that the proviso was not in the nature of a penalty, and that a Court of Equity ought not to restrain the creditor from enforcing immediate payment of the whole moneys remaining due.¹

THIS was an appeal by the defendant from the whole of a decree of Vice-Chancellor STUART.

By an award dated the 1st of January, 1861, it was awarded that the plaintiff was indebted to the defendant in the sum of 1418*l.* 12*s.* 6*d.*, and that this sum should be paid by instalments, 150*l.* on the 15th of February, 150*l.* on the 15th of May, and the residue by three equal instalments, at twelve months, twenty-four months, and thirty months from the date of the award, with interest at 5*l.* per cent per annum. The award also provided that the plaintiff should assign certain policies of assurance to the defendant as security, and that, on the plaintiff making default in payment of any of the instalments, the plaintiff should execute a mortgage to the defendant of certain property therein mentioned, such mortgage to be conditioned for the payment of the 1418*l.* 12*s.* 6*d.*, or so much as should then remain due, and the interest, by instalments as above.

The plaintiff paid the two instalments of 150*l.*, but made default in payment of the first third part of the residue on the 1st of January, 1862, whereupon the defendant took proceedings in bankruptcy against him by trader-debtor summons, and the plaintiff filed an admission that he was indebted to the amount of

* 596 the over-due * instalment, amounting, with interest, to 408*l.* 5*s.* 6*d.* A negotiation was then entered into, with

¹ See Kerr Inj. 82.

a view to the abandonment of these proceedings, and an arrangement was come to which was carried into effect by the following deed.

This deed was dated the 15th of February, 1862, and recited the award, the default in payment and the proceedings in bankruptcy, and that the plaintiff had requested the defendant to forbear further proceedings in bankruptcy and to give him time for payment of the 408*l.* 5*s.* 6*d.*, which the defendant had agreed to do on having the payment of the sum of 1154*l.* 0*s.* 6*d.*, being the residue of the said sum of 1418*l.* 12*s.* 6*d.*, with interest to the 1st day of January then last, and the sum of 100*l.* towards the costs, charges and expenses of the defendant occasioned by the said default in payment, making together the sum of 1254*l.* 0*s.* 6*d.*, secured to him, with interest after the rate aforesaid, by the instalments and in manner thereafter appearing. The plaintiff then assigned certain property, including, along with other property, that mentioned in the award, to the defendant, subject to a proviso that if the plaintiff, his executors, administrators, or assigns, should pay to the defendant, his executors, administrators, or assigns, the sum of 1254*l.* 0*s.* 6*d.* by instalments as follows, 200*l.* on the execution of the deed, 100*l.* on the 15th of April, 100*l.* on the 15th of June, 50*l.* on the 15th of August, 50*l.* on the 15th of October, and 50*l.* on the 15th of December, all in the year 1862; 100*l.* on the 15th of January, 15th of March, 15th of May, 15th of July, 15th of September and 15th of November, 1863, and 104*l.* 0*s.* 6*d.* on the 15th of January, 1864, with interest at 5*l.* per cent per annum on so much of the 1254*l.* 0*s.* 6*d.* as should for the time being remain unpaid, the deed should be void. The deed contained * a covenant by the defendant with the plaintiff * 597 for payment of the 1254*l.* 0*s.* 6*d.* and interest in the above manner. The deed then contained a proviso, that in case default should be made by the plaintiff, his executors, administrators, or assigns, in payment of some or any one of the said instalments thereinbefore covenanted to be paid, and interest as aforesaid, then and in such case the whole of the said sum of 1254*l.* 0*s.* 6*d.*, with interest, or such part thereof as should not have been paid, should immediately become due and payable, notwithstanding the period for the payment of the residue of the said instalments should not have arrived. And the plaintiff, for himself, his heirs, executors, and administrators, covenanted with the defendant, his execu-

tors, administrators, and assigns, that in case the plaintiff, his executors, administrators, or assigns, should make default in payment of some or one of the said instalments as aforesaid, he or they would, immediately on demand by the defendant, his executors, administrators, or assigns, pay to the defendant, his executors, administrators, or assigns, the said sum of 1254*l.* 0*s.* 6*d.*, or such part thereof as should then remain due and unpaid, together with the interest for the same after the rate aforesaid. It was further provided that the deed should be without prejudice to the securities already given in pursuance of the award, and without prejudice to the rights and remedies of the defendant under the award, in the event of default being made by the plaintiff in payment of any one or more of the instalments in pursuance of the deed.

The plaintiff made default in payment of the first instalment of 200*l.*, and the defendant, not having obtained payment of it, commenced, in May, 1862, an action for the recovery of the whole sum. This action was settled, and the first three instalments were paid. Default having been made in payment of the * 598 fourth, the * defendant, in September, 1862, commenced another action for the whole amount of the remaining moneys secured by the deed.

The plaintiff filed his bill to restrain this action, insisting that at the time of the execution of the deed a parol agreement had been made that the proviso and covenant making the whole sum payable immediately upon default in payment of any instalment should not be put in force, and that the plaintiff had executed the deed only on the faith of this agreement, and insisting also that, apart from such agreement, the proviso and covenant were to be treated as inserted only by way of penalty.

On the 17th of April, 1868, the Vice-Chancellor made a decree ordering the plaintiff to pay to the defendant the instalments remaining unpaid of the 1254*l.* 0*s.* 6*d.* in the deed of 15th February, 1862, mentioned, at the times stipulated by that deed, and in default of his so doing the defendant was to be at liberty to apply in Chambers for leave to issue execution upon a judgment which had been obtained by him in his second action. The defendant appealed.

Mr. Bacon and *Mr. Langworthy*, for the plaintiff, in support of
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the decree. — We contend that in the view of a Court of Equity the stipulation for payment of the whole sum at once can only be treated as a penalty to secure payment of the instalments. The course which conveyancers take when it is intended that the whole debt shall be recoverable at once in case of default in payment of any of the instalments, is, to make the debtor in the first place covenant for payment of the whole sum, and then to insert a * proviso restraining the creditor from suing if the instal- * 599
ments are punctually paid. There, no doubt, if default is made, the original covenant is restored to its full force, and there is no relief against its being enforced; but where the primary covenant is for payment of instalments, with a superadded stipulation like that in the present case, it is difficult to distinguish the case from that of a bond in a penal sum for securing payment of an annuity. A complete analogy is furnished by the authorities relating to provisions for the reduction of interest on punctual payment. It is quite settled that if a mortgagor covenants to pay 4*l.* per cent, but that whenever he makes default in payment for a certain number of days he will pay 5*l.* per cent instead of 4*l.* per cent, this latter stipulation is treated only as a penalty, though where the original covenant is to pay 5*l.* per cent, subject to a proviso that the mortgagee shall accept 4*l.* per cent instead of 5*l.* per cent if punctually paid, the mortgagor must pay the 5*l.* per cent in full unless he tenders the 4*l.* per cent within the specified time. *Nicholls v. Maynard*, (a) Jarm. Byth., (b) and cases there cited.

Mr. Malins and *Mr. Caldecott*, for the defendant. — The legal right of the defendant to recover the whole sum at once is undisputed, and there is no ground for equity to interfere. The cases as to penalties have no application. In the case of a penalty a person covenants to pay a larger sum as a means only of more effectually securing a smaller sum; here the provision is merely that if the debt is not paid in a particular way the debtor shall be liable to pay it at once.

Mr. Langworthy, in reply.

* THE LORD JUSTICE KNIGHT BRUCE. — The deed of the * 600

(a) 3 Atk. 519.

(b) Vol. 5, p. 396.

15th of February, 1862, was founded on a valuable consideration, and is binding on both the plaintiff and the defendant. The plaintiff, however, alleges that there was a collateral agreement by parol, made contemporaneously with the deed, and that in equity this agreement precludes the defendant from availing himself of part of the provisions of the deed against the plaintiff. On this point there is a conflict of evidence, but, in my judgment, the evidence on behalf of the defendant so far preponderates that we cannot deal with the case on the footing that any such agreement as the plaintiff alleges to have been entered into was in fact made.

The case then stands upon the deed alone. It appears on the face of that instrument, that a stated amount of debt was at the time of its execution due from the plaintiff to the defendant, but that it was payable only by instalments at certain fixed times, with interest in the mean time. The deed provided for payment of the debt by instalments at periods different from those at which it was originally payable, with interest in the mean time, and it further provided that in a certain event payment of the debt should be accelerated. It did not provide that the amount payable should be increased, but only provided that, instead of being paid at future periods, with interest up to those periods, it should become payable at once, with interest up to that time. To a proviso of such a nature, none of the principles of equity relating to relief in the case of penalties are, in my opinion, applicable. I think that the plaintiff's case wholly fails, and that his bill ought to be dismissed with costs.

* 601 * THE LORD JUSTICE TURNER.—The plaintiff rests his case upon two grounds: first, upon an alleged parol agreement that the proviso upon which the defendant is suing at law should not be enforced; and, secondly, upon the ground that the proviso in question is in the nature of a penalty against which a Court of Equity will relieve. It is impossible to say that the evidence establishes the parol agreement, and its existence is distinctly denied by the defendant. The plaintiff, therefore, fails on the first branch of his case. As to the second question, the proviso must take effect according to its terms, unless it be clear that it was intended only as a penalty. Now an agreement that a sum payable by instalments with interest shall in certain events become payable at once, may possibly in some circumstances amount only

to a penalty ; but I am of opinion that, on the construction of this instrument, the proviso was not intended so to operate. The deed recites that the defendant had agreed to give the plaintiff time upon having the payment of the debt secured to him with interest, " by the instalments and in manner hereinafter appearing," thus referring not only to the payment by instalments, but also to the different mode of payment mentioned in the proviso. That proviso, therefore, as it seems to me, ought not to be taken as in the nature of a penalty, but as expressing the mode in which in certain events the payment was to be made, the contract between the parties being that the sum due should be payable by instalments, provided they were punctually paid, but that, in case of any default in paying them, the whole sum should become payable at once. I agree in the opinion of my learned brother, that the decree ought to be reversed, and the bill dismissed with costs.

1863. June 11. Before the LORDS JUSTICES.

A testator bequeathed his personal estate to trustees upon trust to pay thereout all his debts, funeral and testamentary expenses, and invest the residue upon the trusts therein mentioned, and he disposed of his real estate, part of which was subject to a mortgage. *Held*, that the trust for payment of all the testator's debts out of the personal estate took the case out of the operation of 16 & 17 Vict. c. 117, and that the mortgaged estate ought to be exonerated out of the personalty.¹

THIS was an appeal from a decision of the Master of the Rolls, holding that the will of the testator Fielding Moore did not indicate an intention that an estate which had been mortgaged by him should be exonerated out of his personal estate.

The testator by his will, dated the 2d of November, 1860, specifically disposed of certain parts of his real estate, and bequeathed his household furniture to his wife, and devised the rest of his real

¹ See *Woolstencroft v. Woolstencroft*, 2 De G., F. & J. 347, note (1); *Maxwell v. Hyslop*, L. R. 4 Eq. 415; *Brownson v. Lawrance*, L. R. 6 Eq. 4, 5; *Nelson v. Page*, L. R. 7 Eq. 25; 2 Dart V. & P. (4th Eng. ed.) 748 *et seq.*; *Eno v. Tatham*, 3 De G., J. & S. 443; 1 Sugden V. & P. (8th Am. ed.) 195.

estate to her for life, with remainders over. He then gave his ready money, securities for money, and all other his goods, effects, and personal estate whatsoever and wheresoever to trustees upon trust to call in, sell, and convert the same into money, and stand possessed of the proceeds upon trust thereout, in the first place, to pay all his just debts, funeral and testamentary expenses, and the expenses of proving his will, and after full payment and satisfaction thereof to invest the residue in manner therein mentioned, and pay the income to his wife during her widowhood, and after her death or second marriage dispose of the capital as therein mentioned.

Part of the testator's real estate was subject to an equitable mortgage made by himself to his bankers.

On the 21st of July, 1862, the Master of the Rolls decided that this real estate must be taken *cum onere*, for that the trust for payment of the debts generally out of the personal estate did not indicate a "contrary or other intention" within the meaning of 16 & 17 Vict. c. 117.

* 603 * *Mr. Baggallay* and *Mr. Archibald Smith*, for the appellant, relied on *Eno v. Tatham* (a) as undistinguishable from the present case.

. *Mr. W. Pearson*, for the respondents.

Their Lordships reversed the order of the Master of the Rolls, and made a declaration that the residuary personal estate was primarily liable for payment of the mortgage debt.

(a) Cor. LL. J., *infra*; [1 N. R. 256, 529; 32 L. J. Ch. 311; 9 Jur. N. S. 482.]

LADY MARY TOPHAM v. DUKE OF PORTLAND.

1863. June 20. Before the LORDS JUSTICES.

The costs of an application to stay the execution of a decree pending an appeal to the House of Lords are to be paid by the applicant.¹

THIS was an application by Lady Harriet Cavendish Bentinck, that the proceedings under the decree in this cause, so far as related to the transfer and payment of certain sums of stock and cash to the plaintiff, might be stayed pending an appeal by Lady H. C. Bentinck to the House of Lords from the decree made on the hearing of the appeal before the Lords Justices. (a)

Mr. Giffard and *Mr. T. Stevens*, appeared in support of the application, and the *Solicitor-General* (Sir R. PALMER), *Mr. Charles Hall*, and *Mr. Rowcliffe*, for the plaintiff.

It was arranged that an order should be taken in the following form:—

That notwithstanding the said order (2d May, 1863), *the defendants the Duke of Portland, &c., do on or before * 604 the 20th of July, 1863, or within seven days after service of this order upon them, transfer into the name of the accountant-general in trust in this cause the 22,710*l.* 18*s.* 8*d.* bank annuities in the said order mentioned, and that defendant Lady Harriet C. Bentinck do within the time aforesaid pay into the bank to the credit of this cause the 3311*l.* 0*s.* 9*d.* cash therein also mentioned.

Directions to invest the cash in consols and pay the dividends on the transferred consols and on the purchased consols to the plaintiff Lady Mary Topham upon her separate receipt until further order, with liberty for her to apply for a reinvestment on other securities.

The Solicitor-General asked for the costs of the motion.

Mr. Giffard, for the applicant, contended that the costs ought to abide the result of the appeal.

(a) *Supra*, p. 517.

¹ See 2 Dan. Ch. Pr. (4th Am. ed.) 1471.

Their Lordships after conferring with the registrar said, that, according to the course of the Court, the applicant must pay the costs of the application.

Ordered, that defendant Lady H. C. Bentinck do pay to the next friend of the plaintiff and to defendants the Duke of Portland and Lord H. C. Bentinck their costs of this application, to be taxed, &c.

Reg. Lib. 1363, B. fol. 1427.

1863. June 27, 29. Before the LORDS JUSTICES.

A testator gave legacies to his children absolutely, and then gave the income of his residuary estate to his wife for her life, and directed that after her death the income should be divided equally among his said children during their respective lives, and after the death of all his children he directed the capital to be divided equally among all his grandchildren; provided, nevertheless, that in case of the death of any of his said children, leaving lawful issue, "the respective legacy, share, and interest" of the child or children so dying should immediately thereupon become vested in such his, her, or their issue respectively. *Held*, that upon the death of a child leaving issue before the period of distribution the income of that share of the residue of which the child had been tenant for life was payable until the period of distribution to the issue as joint tenants, and not to the surviving children of the testator.

THIS was an appeal from part of an order of the Master of the Rolls declaring the construction of the will of Edward Foxhall dated the 14th of April, 1813.

The testator gave all his property to his executors, upon trust to pay certain legacies and life annuities, including a considerable legacy to each of his six children by name absolutely. He then directed the income of the residue to be paid to his wife for her life, and proceeded as follows:—

"And from and after the decease of my said wife, then I do hereby direct that the whole of the said rents and profits of my said leasehold estates and premises, the interest, dividends, and

proceeds of the said capital, stocks or funds, and of all other my estate and effects, shall be upon further trust that my surviving executors or executor, his executors or administrators, shall and do from time to time as the same shall become due and payable divide and pay the same unto and among all my said children in equal proportions, share and share alike, for and during their respective natural lives, and from and immediately after the decease of all my children, then my will is, and I do hereby further direct, that the whole of my said leasehold messuages or tenements, buildings, and * premises, and other effects, shall be forth- * 606 with sold and disposed of by my surviving executors or executor, his executors or administrators, either by public auction or private contract, for the most money that can or may be reasonably gotten for the same; and as to, for and concerning the money to be produced by such sale or disposition, the said remaining capital, stocks or funds, and other moneys or securities which shall or may be then due and owing to the said trust estate, and all other the residue and remainder of my estates and effects whatsoever and wheresoever, I give and bequeath the same, and every part thereof, unto and among all my grandchildren in equal proportions, share and share alike, to and for their several and respective absolute use and benefit, and if there shall happen to be but one, then to such only grandchild, his or her executors, administrators, or assigns; provided nevertheless, and I do hereby expressly declare, that in case of the death of any or either of my said children leaving lawful issue, the respective legacy, share and interest under this my will of the child or children so dying shall immediately thereupon go to and become vested in such his, her, or their issue respectively, any thing herein contained to the contrary notwithstanding."

The testator died in 1815 leaving six children; all of them survived the widow, who died in 1842. One of the children died without issue in 1853, and on the 11th of November, 1854, an order was made in this suit declaring that the surviving children of the testator were entitled to the income in equal shares for their lives, with cross remainders between them.

Another child of the testator died in 1862, leaving a daughter, the plaintiff in this suit, who obtained leave to * appeal * 607

from the above order, so far as it declared that there were cross remainders between the children. (a)

Mr. Hobhouse and Mr. Nalder, for the appellants. — Taking the gift to the issue literally, it gives over to them absolutely the share of which their parent was tenant for life. This, however, would conflict with the previous gift of the whole fund to the grandchildren and we do not press it. We contend rather that it was intended to dispose of what was not in terms previously disposed of, and to carry to the issue of a deceased child until the period of distribution the income of that share of which the child was tenant for life.

Mr. Selwyn and Mr. Rasch, for three of the surviving children. — The original gifts to the children are for life only, and at the death of the survivor the fund is given over as a whole. Thus far it is clear that there would be cross remainders. *Neighbour v. Thurlow*. (b) The proviso alone raises a ground for argument. Now there are benefits given by the will sufficient to satisfy the terms of the proviso, and this being so, there is no reason for straining the language of the proviso, so as to make it apply to the residue, to which its wording is inappropriate, for a deceased child having only possessed a life-estate had no "share and interest" capable of going over. We do not say that the words "legacy, share and interest" would not have applied to the residue if transmissible interests in the residue had been first given, or if there had been no other gifts to the children except their life-interests in the residue. The word share will apply to a pecuniary legacy, and there being transmissible gifts to satisfy the proviso
 * 608 it ought not to be stretched so as * to apply to interests not transmissible. *Alt v. Gregory*, (c) *Armstrong v. Eldridge*, (d) *Pearce v. Edmeades*. (e)

Mr. Baggallay and Mr. Bagshawe, for other parties in the same interest. — Apart from the proviso, the will is perfectly clear; the applicability of the proviso to the residue is at best extremely

(a) *Ante*, p. 451.

(b) 28 Beav. 33.

(c) 8 De G., M. & G. 221.

(d) 3 Bro. C. C. 215.

(e) 3 Y. & C. 246.

doubtful, and what is clear should not be cut down by what is doubtful.

Mr. W. W. Cooper, for other parties in the same interest, referred to *Vanderplank v. King*, (a) *Begley v. Cook*, (b) and *Malcolm v. Martin*. (c)

Mr. Hobhouse, in reply. — I submit that the proviso does not apply to the absolute gifts, for it is mixed up with dispositions exclusively applicable to the residue. At all events, the words legacy, share and interest must apply to the interests in the residue, for the words share and interest have no meaning as applied to the particular gifts to the children, which are absolute. The construction for which we contend gives effect to the most reasonable and natural scheme, besides being, as we say, consistent with the proper construction of the language used.

THE LORD JUSTICE TURNER. — It is impossible to come to a perfectly satisfactory conclusion as to the construction of an instrument worded like the present will, but my learned brother and myself have independently arrived at the same conclusion upon * it. The first question is, what meaning is to be * 609 attributed to the words “in case of the death of any or either of my said children leaving lawful issue.” They cannot be confined to death in the lifetime of the testator, for the direction is, that “immediately thereupon” the legacy, share, and interest of each child so dying shall become vested in his or her issue, which could not take place upon death in the lifetime of the testator. Then arises the question, whether these words were intended to affect the capital of the shares in which the deceased children had life-estates. I think not, and for this reason, that if they affect the capital, we have a direction that immediately on the death of a child who leaves issue, the share of capital in which that child had a life-interest shall go over to the child’s issue, which is inconsistent with the previous directions to keep the capital together till all the children are dead, and so contravenes the scope of the will. If, then, these words are not confined to death in the lifetime of the testator, and do not affect the capital, they must virtu-

(a) 3 Hare, 1.

(b) 3 Drew. 662.

(c) 3 Bro. C. C. 49.

ally be struck out of the will, unless they be held to take effect by way of extension of the interests given to the children. The difficulty in doing this arises from the words "legacy, share, and interest." If the word "interest" had alone been used, there would, I think, have been little doubt upon the point, and, in my opinion, the testator must have intended to say "legacy, that is to say, share and interest." It appears to me, therefore, that this clause is intended to apply only to the interest of the share which the deceased child took for life, and that it carries the income of that share to the issue of the child.

The question remains, who are included under the word "issue"? I cannot see enough in this will to restrict the generality of that word, and I therefore think that the children of the plaintiff take, concurrently with * her as joint-tenants, the income of that share to which the plaintiff's mother was entitled for life.

THE LORD JUSTICE KNIGHT BRUCE. — I am of the same opinion.

LODGE v. PRICHARD.

1863. June 23. July 23. Before the LORDS JUSTICES.

The testator was a partner in a trading firm, and shortly after his death the surviving partner became bankrupt. A dividend was paid on the joint debts, and after the joint estate had been fully distributed a decree was made for the administration of the testator's estate. *Held*, that the joint creditors were not entitled to prove under the decree for the unpaid residue of their debts *pari passu* with the testator's separate creditors, but must be postponed to them.¹

¹ See *Kellock's Case*, L. R. 3 Ch. Ap. 777; *Allen v. Wells*, 22 Pick. 453-455; *McCulloh v. Dashiell*, 1 H. & Gill, 96; *Dalghren v. Duncan*, 7 Sm. & M. 280; *Simmons v. Tongue*, 3 Bland, 356; *Woddrop v. Ward*, 3 Desaus. 203; *Hall v. Hall*, 2 McCord Ch. 302; *Wilder v. Keeler*, 3 Paige, 167; *Morgan v. His Creditors*, 20 Martin (La.) 599; *Payne v. Matthews*, 6 Paige, 19; *Bowden v. Schatzell*, 1 Bailey Eq. 260; *Cammack v. Johnson*, 1 Green (N. J.) 163; *Crockett v. Crain*, 33 N. H. 542; *Jarvis v. Brooks*, 23 N. H. 136; *Murray v. Murray*, 5 John. Ch. 50; *Merrill v. Neill*, 8 How. (U. S.) 414; *Bell v. Newman*, 5 Serg. & R. 93; *Walker v. Eyth*, 25 Penn. St. 216; *Morrison v.*

THIS was an appeal by the surviving partner in the firm of Morse & Co., who were creditors of a firm in which the testator Adam Lodge had been a partner, from a decision of Vice-Chancellor STUART, postponing their debt to those of the separate creditors of the testator.

Adam Lodge, the testator in the cause, died in the year 1837. He was at the time of his death a partner in the firm of Graves & Co. Soon after his death Graves, his only surviving partner, became bankrupt. Graves & Co. were largely indebted to Moss & Co. at the time of the testator's death. This debt was proved by Moss & Co. under the commission against Graves, and some dividends were received by Moss & Co. upon this proof, but the dividends so received were not sufficient to satisfy the debt, and the estate was wound up in 1838. After this the suit of *Lodge v. Prichard* and several other suits were instituted for the administration of the estate of Adam Lodge, and decrees having been made in some of them, the balance of the debt due to Moss & Co., after deducting the dividends received, was proved against the estate of Lodge. Separate creditors of Lodge also proved their debts under the decrees, and the estate being insufficient for payment of all the debts *and the costs of the suits, the question *611 arose whether the debt proved by Moss & Co. ought to be paid out of the estate of Lodge *pari passu* with the debts proved by his separate creditors, or whether his separate creditors ought to be paid in priority to Moss & Co.

The Vice-Chancellor Sir JOHN STUART decided this question in favour of the separate creditors, and from that decision the present appeal was brought.

Mr. Southgate and *Mr. Druce*, for the appellant. — We contend that, as there was not any joint estate at the time when the earliest of the administration suits was instituted, the appellant stands in the same position as the separate creditors of the testator. *Gray v. Chiswell* (a) is inapplicable, for in that case there was joint estate which had not been administered. *Cowell v. Sikes* (b) is

Kurtz, 15 Ill. 193; *Cleghorn v. Ins. Bank*, 9 Geo. 319; *Baker v. Wimpee*, 19 Geo. 87; 3 Kent, 64, 65; *Collyer Partn.* (5th Eng. ed.) § 577 *et seq.*, § 584; 2 *Lindley Partn.* (3d Eng. ed.) 1095 *et seq.* But see *Camp v. Grant*, 21 Conn. 41; *Bardwell v. Perry*, 19 Vt. 292; *Emanuel v. Bird*, 19 Ala. 596.

(a) 9 Ves. 118.

(b) 2 Russ. 191.

decisive in our favour. The Vice-Chancellor said that in that case it was decided only that the petitioner might prove, not that he was not to be postponed to separate creditors; but the Order of 28th April, 1827, (a) is a simple order for liberty to prove, and does not contain a word about postponement. In *Ex parte Sadler* (b) there was not any joint estate, but there evidently had been. In *Ex parte Bauerman* (c) there was at the time of the bankruptcy and at the time of the proof a solvent partner, but he had become insolvent before the application to expunge. This case shows that there is no relation back, and, with *Ex parte Geller* (d) and *Ex parte Birley*, (e) furnishes an analogy to guide in the decision * 612 of the present case. Again, a partnership debt * is in equity joint and several. *Wilkinson v. Henderson*. (g) Now a Court of Equity will not allow a creditor having two funds to resort to one of them to the prejudice of persons having only that fund to look to; he is, therefore, sent to the joint estate. But if there is no separate estate the reason for the rule ceases, and *Cowell v. Sikes* goes on this view. *Ridgway v. Clare* (h) was not intended to decide this point, for the Master of the Rolls throughout his judgment assumes the existence of joint estate.

Mr. Bacon and *Mr. Kay*, for the executors.

Mr. Malins and *Mr. Woodroffe*, for separate creditors. — The rights of the creditors must be fixed at the death of the testator, and cannot be varied by subsequent accidents. If a testator has died subject to separate debts and to joint debts, and there is joint estate, the rule is brought into operation that the separate creditors are to be paid out of the separate estate in priority to joint creditors, and that the joint estate is subsequently exhausted cannot alter the rule. Such seems to have been the opinion of Lord ELDON in *Gray v. Chiswell*. (i) In *Ex parte Kennedy*, (k) there was 13*l.* of joint estate, and it was held that the separate creditors had priority as to the separate estate, though the joint creditors never received any thing out of the joint estate, which was ex-

(a) Reg. Lib. A. 1826, fol. 2315.

(b) 15 Ves. 52.

(c) 3 Deac. 476; Mont. & Ch. 573.

(d) 2 Madd. 262.

(e) 2 Mont., D. & De G. 354.

(g) 1 M. & K. 582.

(h) 19 Beav. 111.

(i) 9 Ves. 118.

(k) 2 De G., M. & G. 228.

hausted by the costs. In *Cowell v. Sikes*, there not only was not any joint estate at the time when the question arose, but there never had been any.

Mr. Druce, in reply. — The period at which the existence or non-existence of * joint estate is to be ascertained is the * 618 time when the decree for administration is made.

Judgment reserved.

July 23.

The Lord Justice TURNER, after stating the facts of the case in nearly the terms in which they are given above, proceeded as follows: —

The question as to the rights of joint creditors against the estates of deceased partners has always been felt to be one of much difficulty, and I am not sorry, therefore, to find that the state of the authorities renders it unnecessary for us to consider the grounds on which the question, if untouched by the cases, ought to be decided. The question is, I think, covered by the authorities.

It has long been settled in bankruptcy, that the joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, any surplus there may be of either estate being carried over to the other.

This rule may perhaps proceed upon this ground, that the joint estate is clearly liable both at law and in equity for the joint debts, — at law, by reason of the survivorship, and in equity by virtue of the rights of the partners, *inter se*, to have it so applied; and that the separate estate is as clearly liable both at law and in equity for the separate debts, and that the carrying over the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estate being liable to the separate debts only so far as the interest of the partners from whom the * debts may be due may extend, and from * 614 the separate estates, if taken for the joint debts, having recourse over against the joint estates, and which arise also from the equities between the partners; but whether this rule is strictly

correct it is not for us to say. It has undoubtedly been adopted and acted upon by successive Chancellors for a very great length of time, and we cannot now alter it. According to this rule, therefore, joint creditors cannot touch the separate estate until after payment in full of the separate debts. They take the surplus only after payment of those debts.

Now the jurisdiction in bankruptcy is equitable as well as legal. The rights of creditors, therefore, as settled in bankruptcy, must be taken to be settled with reference to their equitable as well as to their legal rights, and this being so, these rules must, as it seems to me, be held to apply no less to cases in which estates fall to be administered in equity than to cases in which they fall to be administered in bankruptcy. Accordingly we find that in *Gray v. Chiswell* the joint creditors were only let in upon the separate estate after payment in full of the separate debts, and that case has been constantly recognized and treated as having been well decided. It was so recognized and treated by Lord ELDON in *Ex parte Kendal*, (a) by Sir WM. GRANT in *Devaynes v. Noble*, (b) and again in *Vulliamy v. Noble*, (c) by Lord BROUGHAM on the appeal in *Devaynes v. Noble*, (d) and by Sir JOHN LEACH in *Wilkinson v. Henderson*. (e) This view of the rights of joint creditors against the separate estates of deceased partners is also borne out

* 615 by the form of the decrees of the Court in such * cases, *Fisher v. Farrington*, (g) and it is strengthened by this consideration, that if the joint creditors be permitted to resort to both the joint and separate estates they are let in upon two funds, whilst the separate creditors are limited to one only.

It was said, however, on the part of the appellant that in the cases above referred to there was joint estate remaining to be administered, and the further rule in bankruptcy, that joint creditors may prove against the separate estate when there is no joint estate and no solvent partner,¹ was relied upon in support of the appeal, and contended to be applicable in this case; but in this case

(a) 17 Ves. 519.

(b) *Sleech's Case*, 1 Meriv. 566.

(c) 3 Meriv. 619.

(d) 2 R. & Myl. 505.

(e) 1 M. & K. 588.

(g) *Seton*, 280 (2d ed.).

¹ See *Ex parte Kennedy*, 2 De G., M. & G. 228, note (1), and cases cited; *Collyer Partn.* (5th Am. ed.) §§ 923, 926; ARCHER J., in *McCulloh v. Dashiell*, 1 H. & Gill, 96; *Dewey J.*, in *Somerset Potters Works v. Minot*, 10 Cush. 600, 601; *Howe v. Lawrence*, 9 Cush. 553.

there was joint estate, and this rule can be applicable only if it can be made out that the joint creditors are entitled in bankruptcy, when the joint estate has been exhausted, to come upon the separate estate for so much of their debts as may not have been satisfied out of the joint estate. I do not think, however, that the rule in bankruptcy has ever been carried, or can be carried, to this length. If it was, I do not see how any dividend could be made upon the separate estate until the joint estate was wound up, as it would depend upon the produce of that estate whether the joint creditors would come in upon the separate estate; and besides, if this effect be given to the rule, the consequence would be, as above pointed out, that the joint creditors would have a double fund to resort to when the separate creditors could resort to one fund only, which would hardly be conformable to the ordinary rule of making a just and equal distribution. The cases cited by the appellant's counsel in support of their contention on this point do not seem to me to bear out their argument. In *Cowell v.*

Sikes there was not, and never had been, any joint * estate. * 616 *Ex parte Geller* was the case of a pledge. *Ex parte Bauer-*
man goes no further than that the right of joint creditors to go against the separate estate where there is no joint estate is not destroyed by a partner who has become insolvent, having been solvent for a limited time, and I see nothing in the case *In re Birley* which can at all help the appellant. It was suggested on his part that the right of the joint creditor to be paid out of the separate estate, where there were no joint assets, arises from the debt being joint and several; and this may well be so, but the debt is several in equity only, and it does not follow that because there is a several debt in equity the Court will give the same effect to it as if it was to all intents and purposes a separate debt. The doctrine of marshalling was also sought to be called in aid on the part of the appellant, but Lord ELDON seems to me to have disposed of that view in *Ex parte Kendall*. (a) Upon the whole case my opinion is, that the Vice-Chancellor's conclusion upon this point is correct and ought to be affirmed.

THE LORD JUSTICE KNIGHT BRUCE. — My opinion on the point arising in the present case has fluctuated, but I have arrived at the same conclusion as the Lord Justice.

1863. June 23. July 25. Before the LORDS JUSTICES.

A testator was entitled to a moiety of two farms, T. and P., one-fourth of which belonged to L. J. and the remaining fourth to W. J. By his will he gave both farms to his wife for life, and after her death he gave T. to W. J. and E. J. in equal shares, with cross limitations between them, and P. to the plaintiffs. After the testator's death L. J. conveyed his interest in both farms to himself for life, remainder to the testator's widow for life, remainder to the plaintiffs in fee, and died in the widow's lifetime. After the widow's death W. J. elected to take against the will. *Held*, that one fourth of T. belonged to W. J., another fourth to the plaintiffs, another fourth to E. J., subject to the limitations over in favour of W. J., and that the estate and interest of W. J. in T. under the will ought to be apportioned between the plaintiffs and E. J. in proportion to the value of that interest of the plaintiffs in P. and that interest of E. J. in T. of which they had been respectively deprived by W. J.'s election.

THIS was an appeal by the defendants Elizabeth Jenkins and her husband from part of a decree of Vice-Chancellor WOOD.

Lewis Jenkins, under whose will the questions in the cause arose, was entitled to two-fourths of two freehold estates called Tyr-y-wain and Pedola. Another fourth belonged to his nephew William Jenkins and the remaining fourth to Llewellyn Jenkins.

Lewis Jenkins by will dated the 27th of January, 1847, after making certain bequests, gave his residuary estate, real and personal, to his wife for her life, or until her second marriage, and after her decease or second marriage, to Llewellyn Jenkins for life. "And from and after his decease, in manner following: As to my farm called Tyr-y-wain I give and devise the same unto and between my nephew William Jenkins and my niece Elizabeth Jenkins, and their several heirs and assigns for ever, as tenants in common; and I direct that in case either of them shall die without lawful issue at the time of his or her death, the share of the one so dying shall go to the other of them, his or her heirs and assigns for ever. And I give and bequeath unto the said William * 618 and * Elizabeth the sum of 200*l.* towards rebuilding and repairing the houses, outhouses and other buildings on my said farm called Tyr-y-wain. And as to my farm called Pedola and my two leasehold houses at Dowlais, I give and devise the

same unto my nieces Ann Jenkins and Jennett Jenkins, and to their several heirs, executors, administrators, and assigns, according to the nature of the property, as tenants in common; and I direct that in case either my niece Ann or my niece Jennett shall die without leaving any lawful issue living at the time of her death, the share of the one so dying of the said farm and houses shall go to the other of them, her heirs, executors, administrators, and assigns." The testator then after giving some pecuniary legacies, gave the residue of his property after the death or second marriage of his wife and the death of Llewellyn Jenkins to his nephew and nieces William, Elizabeth, Ann and, Jennett as tenants in common.

Shortly after the testator's death Llewellyn Jenkins conveyed all his interest in Tyr-y-wain and Pedola to the use of himself for life, remainder to the testator's widow for life, with remainder to Ann Jenkins and Jennett Jenkins as tenants in common in fee, with limitations over between them in the event of death without leaving issue.

Llewellyn Jenkins died in the lifetime of the testator's widow, and after the death of the widow, Ann Jenkins (now Howells) and Jennett Jenkins instituted the present suit for determining the rights of the parties.

Vice-Chancellor Wood decided, (a) that William Jenkins was put to his election whether he would take under * or * 619 against the will, and the decree declared, that if he should elect to take against the will, then three-fourths of Pedola and one moiety of Tyr-y-wain would belong to the plaintiffs, the remaining one-fourth of Pedola, and one-fourth of Tyr-y-wain to the defendant W. Jenkins, and the remaining one-fourth of Tyr-y-wain to Elizabeth Jenkins.

Elizabeth Jenkins and her husband appealed against so much of this decree as declared that one moiety of Tyr-y-wain would belong to the plaintiffs and one-fourth to Elizabeth Jenkins.

William Jenkins, at the time when the appeal came on to be heard, had not made his election and did not appear on the appeal.

Mr. Wilcock, and *Mr. F. J. Wood*, for the appellants. — The effect of the decree is, that Elizabeth Jenkins, in the event of William Jenkins electing to take against the will, loses half the

(a) 2 J. & H. 706.

interest in Tyr-y-wain which was intended for her by the will and receives no compensation at all, whereas the plaintiffs get one-fourth of Tyr-y-wain as compensation for what they have been deprived of in Pedola. This we submit is manifestly wrong; there ought at least to be an apportionment between Elizabeth Jenkins and the plaintiffs. But we contend that the decree ought to have given one moiety of Tyr-y-wain to Elizabeth Jenkins. The gift to William Jenkins is subject to an implied condition that he should comply with any thing contained in the will and he having broken this condition, matters stand as if the devise to W. Jenkins were struck out of the will, in which case the whole of the testatrix's interest in Tyr-y-wain goes to E. Jenkins.

* 620 * *Mr. W. M. James* and *Mr. Freeling*, for the respondents.

THE LORD JUSTICE TURNER. — The true principle appears to me to be, that where a person elects to take against a will, the persons who are disappointed by that election are entitled to compensation, out of the benefits given to him by the will, in proportion to the value of the interests of which they are disappointed.¹

The Lord Justice KNIGHT BRUCE concurred.

It was then arranged that the case should be mentioned again after William Jenkins had made his election.

July 25.

William Jenkins having elected to take against the will, an order was made, of which the parts material for the present purpose were as follows:—

Defendant William Jenkins by his counsel electing to renounce all benefit given or devised to him by the will of Lewis Jenkins, declare that three-fourths of the farm called Pedola belong to the plaintiffs, and the remaining one-fourth thereof to the defendant Wm. Jenkins. And that one-fourth of the farm called Tyr-y-wain belongs to the plaintiffs, and one other fourth part thereof belongs

¹ See 1 Jarman Wills (8d Eng. ed.) 415.

to defendant Wm. Jenkins, and that one other fourth part thereof belongs to defendant Elizabeth Jenkins, subject to the limitation in the said will contained of the last-mentioned one-fourth to defendant Wm. Jenkins in the event of the death of the said Elizabeth Jenkins without leaving issue living at the time of her death.

* Direct an inquiry what are the respective values of the * 621 one-fourth of the farm called Pedola, of which the plaintiffs have been deprived by the election of defendant Wm. Jenkins, and of the vested interest of defendant Elizabeth Jenkins in one-eighth of the farm called Tyr-y-Wain, and of her contingent interest in one other one-eighth part of the same farm of which she has been deprived by the like election.

Order that all the estate and interest to which defendant Wm. Jenkins would have been entitled in the farm called Tyr-y-Wain under the said will, and which has been renounced by him, be apportioned between the plaintiffs and the defendant Elizabeth Jenkins in proportion to the values found upon the said inquiry.

Reg. Lib. A. 1863, fol. 2020.

GIBBONS v. SNAPE.

1863. June 30. July 28. Before the LORDS JUSTICES.

A deed for barring an equitable estate tail in copyholds is void as against the issue in tail if it is not entered on the rolls of the manor within six calendar months after its execution.

Account of rents directed at the suit of the issue in tail for six years previous to the filing of the bill.

THIS was an appeal from a decree of the Master of the Rolls, the principal question raised being whether an assurance by an equitable tenant in tail of copyholds was void as against the issue in tail, in consequence of its not having been enrolled within six months.

In 1826, Anne Eliza the wife of John Gibbons, Elizabeth the wife of James Adams, and Thomas George Coningham, became entitled in possession as equitable * tenants in com- * 622

mon in tail under the will of Thomas Coningham to certain freehold and copyhold lands.

In 1831 T. G. Coningham became bankrupt, and South Morse was appointed creditors' assignee.

By a deed dated the 12th of February, 1834, John Gibbons and Anne Eliza his wife, and James Adams and Elizabeth his wife, for valuable consideration granted their two-thirds of the property to South Morse and his heirs. This deed was enrolled in Chancery under the Fines and Recoveries Act on the 19th of August, 1834, but was not entered on the Court rolls of the manor till the 10th of February, 1860.

In 1849, the defendant Snape purchased the entirety of the copyholds from South Morse, and the representative of the trustee of Thos. Coningham's will surrendered the legal estate to Snape, who was admitted and had ever since been in possession.

Anne Eliza Gibbons died in May, 1854, leaving two sons, of whom the plaintiff was the younger, and her share in the copyholds devolved upon them in equal shares. The elder son died without issue on the 9th of May, 1861, upon which the plaintiff became entitled in possession to the other moiety of his mother's share.

The share of Mrs. Adams, who had died in 1852, had devolved upon her three sons, who were defendants.

The Master of the Rolls held that the deed of 1834 was ineffectual to bar the estate tail, and made a decree directing an account of two-thirds of the rents received by Snape, as to the share of Mrs. Adams, and as to half the plaintiff's share

* 623 from the 16th of June, 1856, being * six years before the filing of the bill, and as to the other half of the plaintiff's share from the 9th of May, 1861. An inquiry was directed with what occupation rent the defendant Snape ought to be charged in respect of the premises in his possession from the above times, and it was ordered that he should be charged with such occupation rent in the account of rents and profits. It was ordered that an account should be taken of all sums of money expended by Snape in permanent improvements upon and necessary repairs of the premises. And it was ordered that six-ninths of what should appear to have been so expended, if such six-ninth parts should be less than what should be coming on the account of rents and

profits, should be deducted from what was so coming, but if such six-ninth parts should exceed what was so coming on the account of rents and profits, then the excess was to be charged on the shares of the plaintiff and the defendants, other than Snape, ratably. Directions for a partition were given, and no costs were given up to the hearing. The defendant Snape appealed.

Mr. Southgate and *Mr. Swanston*, in support of the decree. — The Master of the Rolls in this case followed his own decision in *Honeywood v. Foster*, (a) previously to which there had not been any decision on the point; but we contend that the decision was correct. In *Dart's Vendors and Purchasers*, (b) it is assumed that a deed to bar an equitable estate tail in copyholds must be enrolled within six months, which shows the understanding of the profession on the point. The clauses 3 & 4 Will. 4, c. 74, §§ 41, 50, 51, 52, 53, 54, show plainly that the object of the Act was to place equitable estates tail in copyholds * on * 624 exactly the same footing as equitable estates tail in freeholds, except that entry on the Court rolls was to be a substitute for enrolment in Chancery. Lord St. LEONARDS (c) accepts the decision in *Honeywood v. Foster* as sound. It is urged that there are manors in which Courts are not held every six months, so that enrolment within the time would not always be possible. In cases where it is impossible, the Act might not apply; but in fact it would always be possible, for the entry of such a deed as this on the Court rolls is a merely ministerial act, which might be done out of Court; and now, under 4 & 5 Vict. c. 35, §§ 6 and 7; surrenders and admittances may be made out of Court.

Mr. Villiers, for the sons of Elizabeth Adams, also supported the decree.

Mr. Hobhouse and *Mr. Townsend*, for the appellant. — We say that the Act imposes no limit upon the time for entering on the Court rolls a disentailing assurance of copyholds. There is nothing in the language of the 53d section to show that the limit as to time is to be imported into the directions as to entry on the Court rolls. The Act contains an express provision as to time

(a) 30 Beav. 1.

(b) Page 359 (2d ed.).

(c) Sug. V. & P. p. 470 (14th ed.).

with reference to enrolment in Chancery, and none as to the time of entry on the Court rolls. It first provides as to who may make dispositions of entailed estates, and to what extent (sects. 15-39), it then proceeds to define the process by which those dispositions may be effected. First comes a series of clauses (sects. 40-49) not applicable to copyholds, and then a series (sects. 50-54) applicable exclusively to copyholds, and expressing in terms what

is intended with respect to them without leaving any thing
 * 625 to implication. Sects. 50 provides * for the prior clauses being applicable to copyhold lands, but does not say that they are to apply to the deeds disposing of copyhold lands; the reference is intended to be made to the clauses 15-39, relating to the disposing power, not to the clauses relating to the formalities of disposition. Sects. 51 and 52 relate to surrenders only. Then sect. 53 provides for equitable estates being dealt with by deed. This is new, and therefore an obligation which would not otherwise exist is imposed of entering the deed on the Court rolls, but there is an absolute silence as to the time at which it is to be done. There too, again, the distinction between the land and the deed occurs. In the 59th clause, freeholds and copyholds are mentioned in juxtaposition, the six months being mentioned as to one but not as to the other, which is a strong proof that the limit of time was not intended to apply to both, it being provided that a freehold deed shall be void if not enrolled within six months, but a direction only being given that a copyhold deed shall be entered on the rolls. The Master of the Rolls was pressed by the inconvenience of allowing an unlimited time. Now, if the legislature has used reasonably clear words, their effect cannot be controlled by arguments as to inconvenience; but, in fact, there is no material inconvenience, for if a tenant in tail sells, the Statute of Limitations runs, and if he keeps the estate himself there is no greater inconvenience than where an owner of freeholds settles them and keeps the settlement secret. At the time when the Act passed there would have been an enormous inconvenience in the construction for which the plaintiff contends. Until 4 & 5 Vict. c. 35, enrolment could only have been effected at a Court, (a) and
 * 626 in many manors Courts were not held so * often as once a year. That the Statute 4 & 5 Vict. has removed this inconvenience cannot affect the argument.

(a) Scriven on Copyholds, p. 222 (4th ed.).

But assuming that the Master of the Rolls came to a sound conclusion on the principal point, we submit that the decree is erroneous in carrying the account of rents back beyond the time of filing the bill. *Penny v. Allen*, (a) *Hicks v. Sallitt*, (b) *Wright v. Chard*, (c) *Vernon v. Wright*. (d) Mrs. Gibbons died in 1854, and there is no excuse for not bringing forward the claim sooner. The decree, moreover, is unfair in making the purchaser liable for the increase of rent which has been occasioned by his own improvements, without allowing him any interest on the sums expended in making them.

Mr. Southgate, in reply. — There is no precedent for allowing interest on improvements in a case like the present. The plaintiff never misled the defendant, and there is no ground for limiting the account to the filing of the bill. The argument that there are in the Act two sets of clauses, one relating to lands and the other to dispositions of lands, and that the clauses as to dispositions not expressly referring to copyholds do not apply to them, is not maintainable. It is hardly possible to contend that sects. 44 and 45, which merely relate to dispositions, do not apply to copyholds. The 54th section is a proviso immediately connected with the 53d, and exclusively relates to formalities of disposition, yet the appellant contends that the 53d section does not make any of the formalities of disposition apply to copyholds.

Judgment reserved.

July 28.

* THE LORD JUSTICE KNIGHT BRUCE. — The construction * 627 which, with regard to copyhold property, the Master of the Rolls, in *Honeywood v. Forster* (e) and in the present case, has put on the Statute 3 & 4 Will. 4, c. 74, an Act that passed some months before the execution of the deed of the 12th of February, 1834, now in question, appears to me not ungrammatical nor opposed to the rules or idiom of the English language, and ought therefore, I think, to be upheld, at least unless there is to be collected from the whole of the statute taken together, or from any

(a) 7 De G., M. & G. 409.

(b) 3 De G., M. & G. 782 [note (1)].

(c) 4 Drew. 673.

(e) 30 Beav. 1.

(d) 7 H. L. Cas. 35, 64.

portion of it, a different intention, or unless such an interpretation will produce or is likely to produce mischief or general inconvenience. My impression is, that there is not to be collected from the whole or any portion of the statute a different intention, and that the reading of it which, in the present instance and in *Honeywood v. Forster*, the Master of the Rolls adopted and acted upon, is less likely to produce mischief, less likely to cause general inconvenience, than that for which the appellant before us contends. I adhere to the reading of the Master of the Rolls, and consider, therefore, the decree in favour of the plaintiff's equitable title and his consequent right to a partition to be correct. It has been said that the decree is too severe upon the appellant as to the account of rents, and hardly favourable enough to him as to his expenditure on the property. I do not, however, see any just cause of complaint against it on either of these grounds.

THE LORD JUSTICE TURNER. — The principal question in this case is whether, under the provisions of the Statute 3 & 4 Will. 4, * 628 c. 74 (the Fines and * Recoveries Act), it is necessary, in order effectually to bar an equitable estate tail in copyhold lands, that the deed executed for the purpose of barring the entail should be entered upon the Court rolls of the manor of which the lands are parcel within six calendar months after the execution thereof, if circumstances will admit of its being so entered. The Master of the Rolls has been of opinion that, in order to bar such an estate tail, the deed must, under such circumstances, be entered upon the rolls of the manor within the above-mentioned period, and the question has been brought before us by this appeal.

The question must, of course, depend upon the terms of the statute. The 41st section is in these terms: —

“ Provided always, and be it further enacted, that no assurance by which any disposition of lands shall be effected under this Act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack-rent, or not less than five-sixths part of a rack-rent), shall have any operation under this Act unless it be enrolled in her Majesty's High Court of Chan-

cery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this Act shall be a bargain and sale, such assurance, although not enrolled within the time prescribed by the Act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled 'For Enrolment of Bargains and Sales,' shall, if enrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been enrolled in * the said Court within * 629 the time prescribed by the said Act of Henry the Eighth."

This section is followed by others which have reference to the consent of protectors, till we come to section 50, which is in these terms:—

"And be it further enacted, that all the previous clauses in this Act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of Court roll, except that a disposition of any such lands under this Act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and, except that a disposition of any such lands under this Act by a tenant in tail thereof whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained."

Sections 51 and 52 again refer to the consent of protectors, and they are followed by sections 53 and 54, which are as follows:—

Sect. 53. "Provided always, and be it further enacted, that a tenant in tail of lands held by copy of Court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this Act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this Act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the Court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to con-

sent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of
 * 630 consent be executed by the protector either * on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the Court rolls, and it shall be imperative on the lord of the manor or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the Court rolls, and he shall indorse on each deed so entered a memorandum signed by him, testifying the entry of the same on the Court rolls. Provided always, that every deed by which lands held by copy of Court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the Court rolls of the manor of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the Court rolls of such manor before the subsequent assurance shall have been entered."

Sect. 54. "Provided always, and be it further enacted that in no case, where any disposition under this Act of lands held by copy of Court roll by a tenant in tail thereof shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed (if any) by which the protector shall consent to the disposition, require enrolment otherwise than by entry on the Court rolls."

The Act then proceeds to deal with estates tail belonging to bankrupts, and section 59 is in these terms:—

"And be it further enacted, that every deed by which any commissioner acting in the execution of any such *fiat* as aforesaid shall, under this Act, dispose of lands not held by copy of Court roll shall be void unless enrolled in his Majesty's High
 * 631 Court of Chancery within * six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such *fiat* as aforesaid shall, under this Act, dispose of lands held by copy of Court roll, shall be entered on the Court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to

the disposition of such lands held by copy of Court roll, and he shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner ; and such deed of consent shall be entered on the Court rolls ; and it shall be imperative on the lord of every manor of which any lands disposed of under this Act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the Court rolls of the manor every deed required by this present clause to be entered on the Court rolls, and he shall indorse on every deed so entered a memorandum signed by him testifying the entry of the same on the Court rolls."

There is also another section, section 71, relating to cases in which estates are to be sold, and the proceeds reinvested in land to be settled so as to create estates tail, and in which moneys are to be laid out in land so as to create such estates ; but I do not think it necessary to state this section, as it seems to me to be merely referential.

That the words of the 50th and 53d sections are sufficiently large to render the provision for enrolment within six months contained in the 41st section applicable to copyhold estates, and to disentailing deeds of such estates by equitable tenants in tail, cannot, I think, * be doubted ; for I cannot agree to the * 632 argument so strongly pressed on the part of the appellant that there is a distinction in the 53d section between the lands and the deed disposing of the lands. The whole tenor of the section seems to me to be opposed to that argument. Taking then the words of the 53d section to be sufficiently large for the above-mentioned purpose, full effect must, I think, be given to them, unless they are controlled by the context, and the context, so far from tending to control them, seems to me to have an opposite tendency. The exceptions contained in the 50th section, and the enactments of the 54th section, seem to me to show that where a distinction is intended to be made in the provisions of the Act as to freehold and copyhold estates, the distinction is in terms expressed. Indeed, the 53d section itself appears to me to have been very carefully studied, with a view to meeting, by express enactment, the cases in which difficulties might arise in the application of the previous

clauses of the Act, leaving the general enactment — that the previous clauses shall apply — to operate in all cases in which no such difficulties could arise. An argument in favour of the appellant's case was attempted to be drawn from the provision at the end of the 53d section, giving priority to a subsequent assurance duly entered on the rolls of the Court, but it is obvious that this proviso might well be meant to apply during the six months allowed for enrolment; and I think, therefore, no weight is due to this argument. Reliance was also placed, on the part of the appellant, upon the terms of the 59th section; but even supposing that the 50th section does not override the 59th, as to which it is unnecessary for us to give any opinion, there are, I think, considerations applying to the case provided for by the latter section which would be sufficient to prevent any inference being deduced from it

which would assist the appellant's case. For these reasons,

* 638 * my opinion upon this part of the case agrees with that of the Master of the Rolls.

The appellant has raised a further point by this appeal under these circumstances: The title of the defendants the Adams as to their share of the estate in question, and of the plaintiff as to half of his share, came into possession before and in the year 1854, and the title of the plaintiff as to the other half of his share came into possession on the 9th of May, 1861. The Master of the Rolls, by the decree, has directed an account of rents and profits, as to the share of the defendants the Adams and as to half the plaintiff's share for six years before the filing of the bill, and as to the other half of the plaintiff's share from the 9th of May, 1861. The appellant complains of this, contending that the account ought not to have been carried back beyond the filing of the bill; but I think there has not been in this case any such *bond fide* adverse possession on the part of the appellant, or any such delay on the part of the Adams or of the plaintiff, as should induce us to alter the decree in this respect, more especially as such a matter rests very much in the discretion of the Court. My opinion therefore is, that this appeal must be dismissed, and with costs.

* In the Matter of THE JOINT-STOCK COMPANIES * 634
WINDING-UP ACTS, 1848 and 1849;

AND

THE JOINT-STOCK COMPANIES WINDING-UP AMEND-
MENT ACT, 1857;

AND

In the Matter of THE STATE FIRE INSURANCE COMPANY.

1868. June 25. August 4. Before the LORDS JUSTICES.

By the policies of an insurance company it was declared that the stock and funds of the company should be subject and liable to pay the sum assured, with a proviso that the stock and funds of the company should be alone liable, and that no member of the company should be individually liable beyond the amount of his share in the capital stock. *Held*, that these policies did not give the assured a charge on the funds of the company so as to entitle them to priority over its general creditors.

THIS was a motion on the part of the holders of several policies in the State Fire Insurance Company, whose claims were matured before the month of September, 1861, to discharge an order of the Vice-Chancellor Sir WILLIAM PAGE WOOD, made in the matter of the winding-up of the company, by which his Honor declared that the official manager ought to distribute the assets of the company in his hands ratably amongst all the creditors of the company, including policy-holders, without prejudice to any question as to marshalling.

The principal question raised by this motion was, whether the appellants and the other holders of policies granted by this company were entitled to be paid the sums which were due upon their policies in priority to the general creditors of the company; in effect, whether the policies held by the appellants and the other policy-holders created a lien or charge on the stock and funds of the company, by virtue of which the policy-holders had a preferential claim upon its assets. There was also a further question raised by the motion, whether, assuming a lien or charge on the assets of the company to be created by the policies, there was any priority between the different policy-holders; but this question did not call for decision, * as the policy-holders failed * 635 upon the principal question.

The following is one of the forms of policy used by the company:—

“Whereas having effected an insurance against loss by fire upon the under-mentioned property, and having made to the State Fire Insurance Company the present payment stated in the margin of this policy as a premium for insuring on the said property the sum of £ from the day of , 1861, until the day of , 1862: now therefore be it known, that from and after the date herein first above mentioned to the date herein last above mentioned, and for so long as the party hereby assured shall make to the said company, with the assent of the directors thereof, the annual payment stated in the margin of this policy at the time aforesaid, the capital stock, or so much thereof as for the time being shall have been subscribed, and other the stocks, funds, securities, and property of the said company remaining, at the time of any claim or demand made, unapplied and undisposed of, in pursuance of the trusts, powers, and authorities contained in the deed or deeds of settlement, shall alone be liable to answer and make good to the assured, and to the heirs, executors, and administrators of the assured, all claims and demands upon the said company as may happen from the destruction or damage by fire of the property herein above described and set forth, not exceeding in any case the sum or respective sums hereinbefore mentioned, subject nevertheless to the conditions printed on the back of this policy. Provided always, and it is hereby expressly declared, that the funds and property of the company shall alone be answerable for the payment of the moneys assured by this policy, and that no director of the company by whom the * 686 policy is signed, nor any other proprietor * of the company, shall be responsible for the payment of or contribution towards the moneys assured by this policy, or be liable to any demand against the company on any pretence whatsoever beyond the amount of the unpaid part for the time being of his or her share or shares in the subscribed capital of the company, and that no person assured by the company shall be liable to any demand against the company on any pretence whatsoever.”

Several other forms of policies were used. In some of the policies the terms were, “that the capital stock and funds of the

company shall be subject and liable to pay." Others of them were in the form of guarantees, and expressed "that the stock and funds of the company shall alone be answerable under this guarantee and all other policies." In all the policies there was a proviso to the same effect as the proviso in the form which is given above at length, that the capital stock and funds of the company shall alone be answerable for all demands, and that no director, officer, or member of the company, or proprietor of shares therein, should be in any manner responsible or liable for any demand or claim upon the company beyond the amount of his or her particular share or interest in the capital stock of the company at the time when such claim might arise, any thing contained in the policy or any law of statute to the contrary notwithstanding. In some cases the proviso was somewhat more strongly worded, "that no director or proprietor of the company shall be individually responsible."

The company stopped payment in September, 1861, and an order for winding it up was made in 1862. The assets collected were about 15,000*l.* The claims of policy-holders amounted to more than 20,000*l.*, and the debts due to general creditors amounted to about 15,000*l.* *The Vice-Chancellor having * 637 made an order for distribution of the assets among these claimants *pari passu*, (a) the present appeal was brought by some of the policy-holders whose claims had been matured before the company stopped payment.

Mr. Daniel and *Mr. Westlake*, for the appellants. — We contend that the effect of these policies is to give the holders charges on the funds of the company, and that being so, the charges must rank as among themselves according to their priority, and must take precedence of all general debts. *Law v. The London Indisputable Life Policy Company*, (b) *In re The Athenæum Life Assurance Society*, (c) *Evans v. Coventry*, (d) *In re The English and Irish Church Assurance Society*, (e) *Robson v. M'Creight*. (g)

(a) 1 Hem. & Mil. 457, where the material clauses of the settlement are set out.

(b) 1 K. & J. 223.

(c) Johns. 633.

(d) 3 Drew. 75; 5 De G., M. & G. 911, on motion for receiver; S. C. at hearing, 2 Jur. (N. S.) 557, V. C. K.; 8 De G., M. & G. 835.

(e) 1 Hem. & Mil. 85.

(g) 25 Beav. 272.

Mr. Rolt and Mr. Druce, for the official manager. — These policies create no charge. The case of *Law v. London Indisputable Life Policy Company* (a) does not decide that they do, but only that the holders have a right to sue in equity to prevent a misapplication of the assets, which are the only source of payment. The cases of *Halket v. The Merchant Traders' Loan Association*, (b) *Sunderland Marine Insurance Company v. Kearney*, (c) and *Hallett v. Dowdall*, (d) establish that a policy in this form is a covenant to pay out of the assets. If it be a covenant which can be

sued on at law as a covenant to pay, it cannot be a charge
* 638 on the * assets. *Robson v. M'Creight* (e) follows *Law v.*

London Indisputable Life Policy Company in deciding that the policy-holder has a right to restrain waste of the assets, because they are the only fund to which he can look for payment. This reason does not apply to a general creditor who has his remedy at law against the shareholders. On the construction of the policies it is clear that the intention was, not to create a charge on the assets, but to limit the policy-holder's right to a claim against them, taking away all right against the shareholders personally. It is true that there is nothing against law in giving a charge on the assets, but unless clear words to that effect are used, the Court will not adopt so inconvenient a construction. What assets are charged; the assets in hand when the claim arises, or at some other and what period? It is almost impossible to give practical effect to a charge on the assets of a going concern. The true view is that the claim of the policy-holder is analogous to the right of a general creditor of a married woman against her separate estate as defined in *Johnson v. Gallagher*. (g)

Mr. Bagshawe, for the creditors' representative. — In none of the cases relied on by the appellants has any question arisen between persons claiming under an instrument of this nature and general creditors, so that the questions of lien or no lien could not arise, and the only point decided was that the claimant had such an interest in the assets as enabled him to sue here. If a general charge on all the assets which a person has or shall have is allowed by law, which I submit is open to great doubt, since such a charge

(a) 1 K. & J. 223.

(d) 18 Q. B. 2.

(b) 13 Q. B. 960.

(e) 25 Beav. 272.

(c) 16 Q. B. 925.

(g) 9 W. R. 506; L. J.

is a fraud on creditors, at all events clear words are needed to create a charge the effect of which would be so inconvenient. If a * charge is created, then, if a fire occurs, none of the * 639 assets of the company can be lawfully dealt with till the claims of the policy-holders are satisfied. The appellants attempt to make a case on the ground of marshalling, but if a creditor has a right to resort to two funds there is no equity to restrain his resorting to them in such order as he thinks fit. *Wallis v. Wood-year.* (a) An insurer is bound to look to the deed of settlement: *Ernest v. Nicholls*; (b) and under this company's deed the directors could not grant policies having the effect for which the appellants contend.

Mr. Willcock and *Mr. Roxburgh*, for the holders of some policies of recent date. — If it be held that the policy-holders have charges, the question remains, whether the charges rank *pari passu*. We contend, that if there is a charge or lien, it is only because there is a fund appropriated to the benefit of the holders of policies. The lien, if there be any, is common to them all. According to one of the forms of policy, the funds are to be applied in payment of the moneys payable under that policy “and all other policies.” The policies ought all to be construed to this effect. Any other view is unreasonable in the case of a company of this kind.

Mr. Daniel, in reply. — The policy, being an engagement under seal to pay, is not the less a covenant at law because it is a covenant for payment out of a particular fund, and so creates, in equity, a lien on that fund. This gives a right to restrain the misapplication of the assets, but not to stop the business of a going concern. While the company is * solvent and properly * 640 managed no inconvenience can arise from holding the policy to create a lien.

Re Athenæum Life Assurance Society (c) was referred to.

Judgment reserved.

(a) 2 Jur. (N. S.) 179.

(c) 3 De G. & J. 660.

(b) 6 H. L. Cas. 401.

August 4.

The Lord Justice TURNER, after stating the nature of the question which had arisen, and the terms of the policies, proceeded as follows : —

Such being the terms of the policies, the question is, whether they create a charge upon the stock and funds of the company. If such a charge is created it must be by force of the words that the stock and funds of the company shall be liable to pay, or by the corresponding words, contained in the policies. Now these words do not seem to me necessarily to create a charge. They may well have been meant to import no more than that the property of the company should be liable to the payment of the sum assured, just as in the case of a contract with a creditor that the property and not the person of the debtor should be liable for the debt, or as, in the case of a peer, it would be so according to law. In such cases it could not, as I apprehend, be said, that a lien or charge upon the property was created in equity. A Court of Equity, in which alone such a lien or charge could be asserted, would give effect to the legal contract, but would not go beyond it. In considering the meaning of these words, and the effect to be given to them, regard must, I think, be had to the state of the law which led to their introduction. By the common law every

* 641 shareholder as a partner in the company would be * liable on all its contracts, and provisions of this nature were no doubt introduced for the purpose of limiting the legal liability, not for the purpose of creating a charge in equity. Again it is to be observed, that it was necessary that some words should be introduced into the operative part of the policy in order to create an express contract. If the case had been left on the proviso alone, there could have been nothing more than an implied contract. If, instead of the words "the stock and funds of the company," the words introduced had been, "the company" shall be subject and liable to pay, the very inconvenience, which no doubt was intended to be avoided, would at once have been created. There was a sufficient reason, therefore, for the introduction of the words in question, without imputing any intention to create a charge in equity; and certainly, in considering the effect to be given to these words, the inconveniences which would result from the construc-

tion contended for by the appellants ought not, I think, to be disregarded. It is obvious, for the reasons assigned in the argument, that this construction would paralyze the company, to the prejudice, not merely of the shareholders, but of the policy-holders also, with the exception, perhaps, of the few among them on whose policies demands might first have arisen. The business of the company could not possibly be carried on, and every claim upon a policy might be made the foundation of a suit in equity. It is remarkable, too, that long as policies of this description have been in use, there is not, as I believe, any instance of any claim upon them having been advanced in equity until very recent times. I do not think, therefore, that, even independently of the provisions of the deed of settlement of this company, the policies in question would operate as a charge upon the stock and funds of the company; but it is now settled, not only by *Ernest v. Nichols*, (a) * but by *Balfour v. Ernest*, (b) that persons * 642 dealing with such companies as these are bound to look to the terms of their deed of settlement, and looking to the terms of the deed of settlement of this company, I do not think that it was within the power of the directors to appropriate the stock and funds of the company to the payment of the policies, so as to create a charge paramount to all other claims on the company; and I think, therefore, that on this ground also the policy-holders are not entitled to the preference claimed by them.

In the course of the argument in this case the cases of *Law v. The London Indisputable Life Policy Company*, (c) *The Athenæum Life Assurance Society*, (d) and *Evans v. Coventry*, (e) were much commented upon, and I do not hesitate to say that in those cases the word "charge" has been unguardedly used both by the Vice-Chancellor Sir WILLIAM PAGE WOOD and by myself, but certainly, so far as I am concerned, I did not use the word in the sense which the appellants attribute to it, for, from the time when these cases have first been brought forward, the difficulty which has now arisen has been present to my mind. It struck me when the case of *Evans v. Coventry* came before us on the motion for a receiver, but it was not necessary then to consider it, there being a sufficient case for interference on the ground of breach of trust. Whether

(a) 6 H. L. Cas. 401.

(d) Johns. 633; 3 De G. & J. 660.

(b) 5 C. B. 601.

(e) 5 De G., M. & G. 911.

(c) 1 K. & J. 223.

we afterwards went too far in the decree in that case (a) I am not prepared to say, but, so far as my recollection serves me, our intention certainly was not to decide any thing between the policy-holders and the general creditors, and I doubt, indeed, whether

* 643 any such question was involved in the * suit; but however this may be, and whether the cases referred to were rightly or wrongly decided (although I desire to be understood as not meaning to cast any doubt on the right of a Court of Equity to interfere in such cases as the present, where there is waste or breach of trust), I am satisfied that there is no lien or charge created by the policies in this case, and that the order of the Vice-Chancellor is therefore right, and the appeal must be dismissed. Under the circumstances of the case, however, I think that the costs of all parties should be paid out of the fund.

THE LORD JUSTICE KNIGHT BRUCE. — In this case I acknowledge myself not free from doubt, doubt hardly amounting or not amounting to dissent.

WALLACE v. AULDJO.

1863. July 13, 25. August 4. Before the LORDS JUSTICES.

A wife filed a bill against the trustee of a fund to which she was entitled and her husband to enforce her equity to a settlement. The defendant appeared, but before any further step had been taken in the cause the wife died. *Held*, that the fund was not so bound as to entitle her children to enforce their mother's equity to a settlement.¹

THIS was an appeal by the plaintiffs from an order of Vice-Chancellor KINDERSLEY, dismissing their bill with costs. (b)

In 1827, Louisa Wallace, the mother of the plaintiffs, married the defendant George Wallace. In February, 1857, they separated from each other. On the 18th of February, 1861, Mrs. Auldjo, the mother of Mrs. Wallace, died, and thereupon a considerable fund, in which Mrs. Auldjo had a life-interest, with remain-
* 644 der to her * four sons, become divisible. Mrs. Wallace

(a) 8 De G., M. & G. 835.

(b) 2 Drew. & Sm. 216.

¹ See 1 Dan. Ch. Pr. (4th Am. ed.) 106; 2 Story Eq. Jur. § 1417, and note.

as one of the next of kin of a deceased brother, thus became entitled in possession to a sum of between 2000*l.* and 3000*l.* This sum being in the hands of the representatives of the deceased brother, Mrs. Wallace, in August, 1861, filed her bill against her brother's representatives and her husband to enforce her equity to a settlement, claiming to have the whole fund settled. The defendants appeared to the bill, but before any further step had been taken in the cause, Mrs. Wallace died on the 19th of November 1861.

On the 30th of June, 1862, the children of Mr. and Mrs. Wallace filed the present bill as supplemental to the former bill, praying to have the benefit of the former suit, and to have divided among them such sums of money as they would have been entitled to if a settlement had been ordered in the former suit.

Vice-Chancellor KINDERSLEY decided, that as Mrs. Wallace had died before decree, no trust was impressed on the property at her death, and that her children had no right to enforce a settlement. His Honor therefore dismissed the bill, with costs.

Mr. Glasse and *Mr. Pontifex*, for the appellants. — *Elibank v. Montolieu* (a) established the right of a married woman actively to enforce her equity to a settlement by filing a bill; and *Murray v. Elibank* (b) furnishes an instance of a supplemental bill by the children of the wife to continue the suit instituted by her. The view of Lord ELDON (c) appears to have been that the right of the wife attached on her filing her bill; and in *Steinmetz v. Halthin*, (d) Sir JOHN LEACH clearly lays * down that this is * 645 the period. *Groves v. Clark* (e) contains a passage supporting this view; and in *Lloyd v. Mason* (g) the Vice-Chancellor intimates an opinion, that immediately after filing her bill the wife may present a petition for a settlement. In *Delagarde v. Lempriere* (h) no bill had been filed by the wife, but she had put in an answer not claiming a settlement; and these facts are adverted to by the Master of the Rolls in terms leading to the conclusion, that if she had filed a bill the decision would have been different. *Lloyd v. Williams* (i) will be relied on as against us, but the reasoning

(a) 5 Ves. 737.

(b) 10 Ves. 84; 13 Ves. 1.

(c) 10 Ves. 90.

(d) 1 Glyn & J. 64.

(e) 1 Keen, 132, 139.

(g) 5 Hare, 149.

(h) 6 Beav. 344.

(i) 1 Madd. 450, 458.

is not satisfactory, for it is no stronger interference with a husband's rights to hold him bound by the filing of the bill, than to hold him bound by the decree. *Osborn v. Morgan*, (a) which has been relied upon by the respondents, does not apply to the present case. The discretion of the trustee is taken away by the filing of the bill; he can no longer pay the husband; her right to a settlement must therefore be considered to have attached from that time. That a woman may waive her equity to a settlement has been urged as a reason why her children cannot enforce this equity. But a woman can waive a settlement even after decree, so that this argument proves too much; for after decree, if the wife dies, it is clear that the children can continue the suit and enforce the equity.

Baldwin v. Baldwin, (b) *Lovett v. Lovett*, (c) *Barker v. Lea*, (d) and *Whittem v. Sawyer*, (e) were also referred to.

Mr. Hobhouse and *Mr. Charles Hall*, for the respondents.

*646 — The children cannot maintain this suit, which is in * fact an original suit, though it professes to be supplemental. In *Murray v. Elibank*, (g) there had been a decree in the wife's suit, and Lord ELDON founds his judgment on that. His remark, on which the plaintiffs rely, is in fact a reasoning against the claims of the children. Lord ELDON is showing the unsoundness of the existing rule, and the difficulties in the way of applying it. He would evidently have decided against the children had he not been bound by authority. There the wife had obtained a decree, and Lord ELDON held the children entitled to prosecute it. The case before Sir W. GRANT does not put the claims of the children any higher, nor does any case in the books, except that before Sir JOHN LEACH. In *Lloyd v. Williams*, (h) Sir T. PLUMER reviews the authorities, and the result is, that the right of the children can only arise under contract or decree. *Steinmetz v. Halthin* (i) is unsound. The fact that the fund is under the control of the Court, so that the Court has become the trustee, cannot alter the equitable interests of the parties. In *Groves v. Clark* (k) this was not a point in the cause, and the construction put upon Lord

(a) 9 Hare, 432.

(b) 5 De G. & Sm. 319.

(c) Johns. 118.

(d) 6 Madd. 330.

(e) 1 Beav. 593.

(g) 10 Ves. 84; 13 Ves. 1.

(h) 1 Madd. 450.

(i) 1 Glyn & J. 64.

(k) 1 Keen, 132.

ELDON's remarks in *Murray v. Lord Elibank* is erroneous. In *Delagarde v. Lempriere* (a) the authority of *Steinmetz v. Halthin* is expressly denied. The question is, From what time is the husband bound? Now a defendant is in no case bound by the filing of a bill. The reasoning in *Lloyd v. Mason* (b) is in our favour, and so is *Baker v. Bayldon*. (c) A bill is filed, not to create a right, but to enforce one; the right must be pre-existent; so the mere filing a bill cannot bind the fund, there must be *some * 647 order fixing the right. *Osborn v. Morgan* (d) shows that the Court will deal with such cases only according to the circumstances as they stand at the hearing. Filing a bill does not bind property, though, as a *lis pendens*, it may have an effect analogous to that of equitable notice. An executor, after the filing of an administration bill, may waive the Statute of Limitations as against a creditor, but he cannot do so after decree. The filing a bill for redemption does not prevent a mortgagee exercising his power of sale, though a decree for redemption does. *Cafe v. Bent* (e) shows that filing a bill to execute a trust does not take away the discretionary powers of trustees. A decision in favour of the plaintiffs is not the necessary logical consequence of what the Court has done in other cases with respect to the equity to a settlement; but if it were, the whole doctrine is so arbitrary, that the Court will hesitate to accept the logical consequences, it being impossible to lay hold of any general principle to govern the case.

Mr. Berkeley, for the trustees of the fund.

Mr. Glasse, in reply.

Judgment reserved.

August 4.

THE LORD JUSTICE KNIGHT BRUCE. — In this suit the plaintiffs the children of the late Mrs. Wallace claim against her husband their father a settlement of or out of certain personal property, in value between 2000*l.* and 3000*l.*, to which she was equitably entitled but not for her separate use, and to which * accord- * 648 ingly he in her right immediately before her death was, and

(a) 6 Beav. 344.

(d) 9 Hare, 492.

(b) 5 Hare, 149.

(e) 3 Hare, 245.

(c) 8 Hare, 210.

as her administrator or having a right to be her administrator ever since her death has been and is, equitably entitled, subject only to such right, if any, as she had, and to such right, if any, as the present plaintiffs in the character of her children have, to a settlement. Mrs. Wallace in her lifetime instituted a suit in this Court for the purpose, which suit was in existence at her death. And if she had not in her lifetime instituted any suit, it is plain and clear that, all things else being the same, the bill filed by the present plaintiffs would have been unfounded and without title. Unless supported, therefore, by Mrs. Wallace's bill it fails wholly. But Mrs. Wallace did not bring her suit to a hearing. There was in her lifetime neither decree in it nor any order in it whatsoever, nor even any answer as I understand. The defendants to her bill appeared to it before her decease, but neither the bill nor any appearance to it bound her to any thing, nor was any thing decided against her husband in any way. Assuming, therefore, that if she had in her lifetime prosecuted her cause to a hearing she would have obtained a decree for a settlement against him, a question perhaps in the circumstances of the case reasonably arguable, I think that all possible benefit from the suit was lost to herself and her children by her death happening when it did, and that the rights of her husband then became and are to all intents and purposes the same as if her suit had never existed. Judicial opinions have not been uniform on this point, as the reports show, but reason and analogy as well as the preponderance of authority appear to me strongly in favour of the view that I have stated, and accordingly I cannot dissent from the dismissal of the present bill, though I should have preferred its dismissal without costs, and should take that course were I now hearing the present cause originally.

* 649 *THE LORD JUSTICE TURNER.—I have read through the cases upon this subject and the Vice-Chancellor's judgment upon this case as reported in the "Jurist," and I find it impossible to say any thing upon the question before us which would not be a mere repetition of what has been already said. It was attempted to distinguish this case upon the ground of a bill having been filed by the wife in her lifetime and of the discretion of the trustees having as it was said been thereby taken away, but, whether the discretion of the trustees was taken away or not, I can find no answer to the

argument that there can be nothing to bind the marital right of the husband until a decree is made. I think, therefore, that this appeal is wholly groundless and ought to be dismissed.

GREEN v. BRITTEN.

1863. August 1, 4. Before the LORDS JUSTICES.

A testator bequeathed his residuary personal estate, consisting partly of ships, to his sister B. (a married woman), subject to the legacy thereafter bequeathed to T. and the commission directed to be paid to him, and subject to the directions thereafter contained as to the conversion of ships. He appointed H. and T. his executors, and gave T. a legacy for his trouble, and directed his executors not to sell any of his ships for seven years from his death (unless the keeping them unsold should cause loss), and to work them, employing as much of his residuary estate as should be necessary for that purpose, and he gave T. an allowance of 500*l.* a year for his trouble while he should assist in managing them. By a codicil he stated that he still wished B. to have the residue, but directed that it should be invested in such manner as his executors should think fit, "in trust for her sole benefit during her lifetime," and that after her death it should be divided between her surviving children. *Held*, that the direction to keep the ships unsold for seven years was not revoked by the codicil, and that while they remained unsold B. took the actual income for her separate use.¹

THIS cause came on for hearing on motion for decree and was heard by the Lords Justices in the first instance.

The suit was for the administration of the estate of *Mr. *650 Richard Green of Blackwall, who by will dated the 2d of April, 1849, after various dispositions, which need not here be specified, of certain parts of his property, proceeded as follows:—

"And as to all the rest, residue, and remainder of my real and personal estate of whatsoever nature, kind, or quality the same

¹ See *Gilbert v. Lewis*, *ante*, 38; *Brown v. Gellatly*, L. R. 2 Ch. Ap. 751, 757; *Massy v. Rowen*, L. R. 4 H. L. 288. In interpreting a will and codicil the general rule is, that the whole will takes effect except so far as it is inconsistent with the codicil. *Robertson v. Powell*, 2 H. & C. 762; See *Hearle v. Hicks*, 1 Cl. & Fin. 20; *S. C.* 2 Bing. 475; *Freeman v. Freeman*, 5 De G., M. & G. 704; *In re Arrowsmith's Trusts*, 2 De G., F. & J. 474; *Molyneux v. Rowe*, 8 De G., M. & G. 368.

may consist at the time of my decease, I give, devise, and bequeath the same and every part thereof unto and to the use of my dear sister Emma, the wife of Daniel Britten, Esq., her heirs, executors, administrators, and assigns absolutely and for ever, subject however to the legacy hereinafter bequeathed to my friend Captain William Toller and to the commission hereinafter directed to be paid to him; and subject also to the directions hereinafter contained with regard to the conversion into money of my private shares in ships and the trust in connection therewith; and I do hereby nominate and appoint my brother Henry and the said William Toller executors of this my will, and I request the said William Toller to accept the sum of 1000*l.* for the trouble he will be put to as one of the executors of this my will; and I do hereby direct that my said executors shall not sell or convert into money any of my ships or private shares in ships for the period of seven years from the date of my decease, unless the keeping of them shall cause loss or diminution of my estate; and in such case I give unto my said executors a discretionary power to sell the same; but, subject as aforesaid, I direct that my said executors shall retain my said ships and shares of ships for the period of seven years at the least, upon trust to superintend and manage the same and to direct the voyages thereof, and to do and perform all such acts, matters, and things as may be necessary for the working and employment of the same in such manner as managing owners or proprietors of such ships would do; and for that purpose I declare that my said trustees shall be at liberty to lay out and expend all the residue of my said estate, or so much thereof as shall from time to time be necessary or expedient for the successful working and employment of my said ships or shares of ships; and I further direct that the said William Toller shall be paid or be at liberty to retain for his own use, out of the managing owners' commission, for assisting in the management of the said ships, the sum of 500*l.* per annum, in addition to the said legacy or sum of 1000*l.*, during such time as he shall assist in such management."

The testator made a codicil dated the 24th of October, 1855, to the above will, and thereby, after giving several pecuniary legacies, he proceeded as follows:—

"I still desire that my sister Mrs. Daniel Britten should have
[506]

the residue of my property, but I particularly desire that the same should be invested in any way my executors think proper, in trust for her sole benefit during her lifetime, and at her death it is to be divided equally between her surviving children. I Richard Green declare this codicil and the contents of my will (except what is therein stated with reference to Mrs. Daniel Britten) to contain my wishes, and I desire that no lawyer shall dare to attempt to upset them, and any person interested in my effects that interferes with my executors in carrying out my wishes shall forfeit all their claims to any of my effects, and that the same shall be given to charities."

The testator made several other codicils, but they contained nothing material to the question argued at the hearing as to the rights of Mrs. Britten with respect to the ships.

The bill was filed by the executors to have the trusts * of * 652 the will carried into execution, various difficulties having arisen, as to which it was necessary to obtain the direction of the Court.

Sir H. M. Cairns and *Mr. Cumin*, for the plaintiffs, the executors. — The scheme of the will is to keep the ships unsold for seven years and to continue the employment of them. The first question in the case is, whether the earnings of the ships ought to be treated as interest, together with instalments of capital, and the tenant for life ought to receive only 4l. per cent on the capital, or whether she ought to receive the whole earnings. *Meyer v. Simonsen* (a) lays down the principles applicable to these cases. The other question is, whether the codicil revokes the direction in the will to keep the ships unsold.

The Solicitor-General (Sir R. PALMER), *Mr. Giffard*, and *Mr. Hawkins*, for Mrs. Britten, the tenant for life. — We do not wish the ships to remain unsold; but we say that while they are unsold the tenant for life is entitled to the whole earnings. The gift to Mrs. Britten by the will was absolute, and an absolute gift cannot be controlled by any directions as to the mode of its enjoyment, where the donee is *sui juris*. The trust in the will is simply for manage-

ment, without any directions as to investment. The codicil substitutes an entirely new scheme of disposition, and a tenancy for life being there introduced, directions as to investment are for the first time given. The direction for investment applies to the whole residue, and is inconsistent with the direction to keep the ships unsold, which it therefore revokes. The ships therefore should be sold; but

while they are unconverted, Mrs. Britten takes the whole earnings. * 653 *Alcock v. Sloper*, (a) *Burton v. Mount*, (b) *Morley v. Mendham*, (c) *Skirving v. Williams*, (d) which closely resembles the present case; *Rowe v. Rowe*, (e) *Simpson v. Lester*. (g) She takes to her separate use: *Ex parte Ray*, (h) *Taylor v. Stainton*, (i) Jarm. Wills, (k) and therefore can concur in getting rid of a direction not to sell.

Mr. Rolt, *Mr. Willcock*, and *Mr. J. H. Taylor*, for parties entitled in remainder. — We contend that there is nothing to take the case out of the ordinary rule that the tenant for life is entitled to no more than 4l. per cent on the value of property which ought to be converted. In all the cases referred to on the other side, the income was given in terms which would carry income from whatever source. This case, where only the income of the investments authorized by the codicil is given, stands on quite a different footing. The postponement of sale is a measure for the benefit of all parties, not for that of the tenant for life only.

Sir H. M. Cairns, in reply. — The direction for non-conversion of the ships will fit perfectly well into the codicil, and cannot be treated as revoked by it. It is a direction which the parties are not competent to get rid of.

Judgment reserved.

August 4.

* 654 * THE LORD JUSTICE KNIGHT BRUCE. — I think that the ships in question in this cause ought to remain unconverted

(a) 2 Myl. & K. 699-702.

(b) 2 De G. & Sm. 383.

(c) 2 Jur. (N. S.) 998, V. C. W.

(d) 24 Beav. 275.

(e) 29 Beav. 276.

(g) 4 Jur. (N. S.) 1269, V. C. K.

(h) 1 Madd. 199.

(i) 2 Jur. (N. S.) 634, V. C. W.

(k) Vol. 2, p. 22.

for the period of seven years from the testator's death, subject to the discretion of the executors to sell them if the retaining them unsold should cause loss to the estate. I think that while they thus remain unsold, the income derivable from them belongs to Mrs. Britten for her life for her separate use. She being willing to insure the ships, no question arises as to their insurance.

THE LORD JUSTICE TURNER. — Two questions are raised on the construction of the will and codicils of the testator in this cause. First, whether the trust created by the will for retaining the testator's ships and shares of ships unconverted for the period of seven years is superseded by the codicils to the will; and secondly, whether, if this trust be not so superseded, Mrs. Britten as tenant for life of the residue is entitled to the whole income to be derived from the ships and shares of ships during the seven years for which they are to remain unconverted.

As to the first of these questions, I am of opinion that upon the true construction of the will and codicils the ships and shares of ships ought to remain unconverted for the period of seven years, subject, of course, to the discretion of the executors to sell any of them in the event of their causing loss to or diminution of the testator's estate. I think so for this reason, that the gift of the residue by the will is expressly made subject to the trusts for retaining the ships unconverted, and that the first codicil therefore only takes effect subject to those trusts. This codicil, it is true, alters the disposition of * the residue, but it alters the * 655 disposition only of what is residue, and the residue is only what remains after answering the particular trusts as to the ships and shares of ships. The will cannot, as it seems to me, be construed otherwise than as if the trusts of the ships and shares of ships had preceded the gift of the residue, in which case I apprehend there could be no doubt that these trusts would have remained unaffected by the first codicil.

As to the second question, my opinion is that Mrs. Britten is entitled to the whole income to be derived from the ships and shares of ships during the seven years for which they are to remain unconverted. The direction that this property should not be converted during the seven years is tantamount to a direction that it shall remain *in specie* during those seven years, and the property being part of the residue subject to the trust of its remaining *in*

specie for seven years, I think the tenant for life must be entitled to the income of it while it so remains *in specie*. This view of the case is, I think, strengthened by the direction for the payment of the 500*l.* a year to Captain Toller, which seems to me to be a charge on the income of the entire residue, and not upon the income of this property only. What is taken by Mrs. Britten is, I think, taken for her separate use, and she being willing to insure the ships, I think the order should provide for her doing so. I think it should also be expressed to be without prejudice to the discretionary power given to the executors, and without prejudice also to any question as to the income to be derived from the ships and shares of ships after the expiration of the seven years.

* 656 * In the Matter of The TRUSTS OF THE WILL OF
WILLIAM WALLOP;

AND

In the Matter of The ACT FOR BETTER SECURING TRUST
FUNDS AND FOR THE RELIEF OF TRUSTEES.

1864. January 22. March 11. Before the LORDS JUSTICES.

An English testator by will gave a fund to trustees upon trust to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint. The daughter for some time previous to and up to her decease was domiciled in Jersey. She disposed of the fund by will, giving legacies to two persons and the residue to her husband. *Held*, that the legacies were liable to duty. *Per* the Lord Justice TURNER. — The legacies, by reason of the domicile in Jersey, were not liable to legacy duty, but, notwithstanding the fact of such domicile, were liable to succession duty.¹

THE question in this case was, whether two legacies of 3000*l.* and 1000*l.* were free from legacy and succession duty.

William Wallop (who was resident and domiciled in England), by will dated the 12th of April, 1850, directed his real and per-

¹ See *Callanane v. Campbell*, L. R. 11 Eq. 378; *Wallace v. Attorney-General*, L. R. 1 Ch. Ap. 1; *In re Capdevielle*, 2 H. & C. 985, 1013, 1016, 1020, 1021; *Attorney-General v. Blucher De Wahlstatt*, 3 H. & C. 374; *Smithe's Will*, 12 W. R. 933.

sonal estate to be converted into money, and the proceeds to be invested in the public stocks or funds or upon real securities, and directed his trustees to hold the fund upon trust to pay the income to his daughter Henrietta Wallop for life for her separate use with a restraint on anticipation, and after her death to hold the capital and subsequent income upon certain trusts which failed by the death of the daughter without issue, and upon the failure or determination of those trusts upon trust for such person or persons and in such shares and proportions and to and for such intents and purposes and generally in such manner in all respects as the daughter should by deed or will appoint, appointment by deed being only by her while *sole*, and in default of appointment upon the trusts therein mentioned.

The testator died in May, 1856.

* In 1857 the daughter intermarried with Moses Gibaut, * 657 and in 1858 she made her will, by which, in exercise of the power, she gave to Sarah Croxford 8000*l.* consols standing in the names of the trustees of her father's will, and to Sidney Waters 1000*l.* consols standing in the same names, and gave the residue of all her property to her husband charged with her debts and funeral expenses.

Madame Gibaut died in August, 1860.

On the death of William Wallop his executors had paid legacy duty at the rate of 1*l.* per cent on the life-interest of Madame Gibaut, and on her death they paid duty at 1*l.* per cent on the whole fund after allowing for the duty already paid according to 36 Geo. 3, c. 52, § 18.

Moses Gibaut at the time of his marriage and thenceforth to the death of his wife was domiciled in Jersey.

William Wallop's trust estate, consisting among other things of 12,474*l.* 9*s.* 7*d.* consols, had been paid into Court under the Act for the Relief of Trustees, and by an order made on the 29th of July, 1862, 2700*l.* consols had been transferred to Sarah Croxford, 900*l.* consols to the separate account of Sidney Waters free from duty, and the rest of the funds to Moses Gibaut, except a sum of 600*l.* consols which was retained in Court to answer duty if payable, and carried to an account intituled, "A fund set apart to answer legacy duty (if any)."

Moses Gibaut, Sarah Croxford, and Sidney Waters now presented a petition praying that 300*l.* consols might be transferred

to Sarah Croxford, 100*l.* consols to Sidney Waters, and the residue to Moses Gibaut.

* 658 * The petition, on account of the importance of the question, was by special leave heard before the Lords Justices in the first instance, and the case was opened by the counsel for the Crown.

The Attorney-General (Sir R. PALMER) and *Mr. Hanson*, for the Crown. — The first question is, whether the legacies of 3000*l.* and 1000*l.* are liable to legacy duty. This depends on the Statute 36 Geo. 3, c. 52, § 7, which makes any testamentary gift taking effect out of personal estate over which the testator has a general power of appointment, liable to duty as a legacy. The dispositions made by the will of Mrs. Gibaut come within the express terms of that section. It is a fallacy to mix up this section with the 18th, under which the fund has already paid the duty of 1*l.* per cent as a legacy under the will of Mr. Wallop. There is nothing in the Act which says, that where the one duty is paid the other shall not be. The 18th section provides, that “where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property upon the execution of such power shall be charged with the same duty and in the same manner as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof.” Under this clause the property has paid duty on the principle of charging Madame Gibaut as if the property had been given absolutely to her. The property then passes under the appointment made by her will, being property which the testatrix had power to dispose of “as he or she shall think fit,”

* 659 sect. 7. Now *Platt v. Routh*, (a) and * *Drake v. Attorney-General*, (b) decide that in such cases the duty is payable in the first place as if the property had been given to the appointor, and that the appointees also must pay legacy duty. The only question that remains then is, whether the fact, that the appointor was domiciled abroad, takes the case out of that section. Only two principles can be relied on in support of that contention. The

(a) 3 Beav. 257.

(b) 10 Cl. & Fin. 257.

first is *mobilia sequuntur personam*. According to that principle the personal estate in this country of a person domiciled abroad does not pay legacy duty. *Thomson v. Advocate-General*. (a) But this principle only extends to property of the individual, not to powers which he can exercise. Another principle was laid down by Lord COTTENHAM in *Arnold v. Arnold*, (b) that the legislature in speaking of wills, persons, and personal estates is *primâ facie* to be understood as speaking of wills, persons, and personal estates in this country. But a will executing a power stands on the same footing as any other instrument executing a power; the disposition takes effect, not by virtue of the instrument exercising the power, but under the instrument creating it, the instrument by which it is exercised being a mere conduit pipe. The Legacy Duty Acts may to some extent place power and property on the same footing, but they do not introduce any new general principle so as to obliterate the distinction between power and property. If the power is to be executed by a testamentary instrument, the validity of that instrument may have to be tried by foreign law, but only as the Ecclesiastical Court here has to decide whether an instrument executed by an Englishman in exercise of a power is testamentary or not. An Englishman domiciled abroad must, until the Act 24 & 25 Vict. c. 114, * have made a will of his own personal estate * 660 according to the laws of the country of his domicile, not so if he had only a power of appointment by will. We contend, therefore, that under the express terms of the 7th section, this property is chargeable with duty, and that the principle which exempts from duty the personal estate of a testator domiciled abroad has no application to a power vested in him; and that, though the legislature for certain purposes treats power and property as identical, you cannot by analogy, in cases to which those enactments do not apply, treat the distinction between the two as abolished. The 18th section of the Legacy Duty Act places power and property on the same footing for certain purposes, but does not say that they shall be treated as identical for any other purposes. Thus in *Drake v. Attorney-General*, (c) it was held, that the Acts do not make a power to appoint equivalent to ownership for the purpose of subjecting the fund to probate duty. I do not contend that the appointees would be liable to duty here, but for

(a) 10 Cl. & Fin. 1, 20.

(c) 10 Cl. & Fin. 257.

(b) 2 My. & Cr. 256, 270.

the express words of sect. 7. That section and the 18th make the fund liable to pay duty in the first place as if given absolutely to the donee of the power, and then in the second place as if he had bequeathed it to the appointees, but they contain nothing to exempt the property from duty, on the ground that it is to be treated for all purposes as if given absolutely to the donee of the power.

But if legacy duty is not payable, we say that succession duty is. The material clauses of the Succession Duty Act (16 & 17 Vict. c. 51) are the 2d, 4th, 10th, and 18th. These appointees clearly take a succession within the express words of the 2d section. They became beneficially entitled on the death of * 661 Madame * Gibaut, who died after the passing of the Act, and they became so entitled under a disposition made in one or other of the wills, both of which were made after the passing of the Act. The 10th section defines the rate of duty, fixing it according to the relationship between the successor and predecessor. The 4th section deals with general powers of appointment, and makes the donee of such a power, if he exercises it, liable to duty as on a succession derived from the donor of the power. So if Madame Gibaut's estate had not paid legacy duty it must have paid succession duty under this clause. That clause, however, does not provide for the succession duty payable by the appointee, but leaves it to be regulated by general principles. The 18th section exempts from succession duty property which is liable to legacy duty, and it provides that no duty shall be payable by any person in respect of a succession which, if it was a legacy bequeathed to him by the predecessor, "would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts." This does not mean that no person, who, if the property had been a legacy would not have paid legacy duty, shall pay succession duty; it means only that where the property, if a legacy, would by virtue of some special exemptions in the Legacy Duty Acts have been free from duty it shall not pay succession duty; *Attorney-General v. Fitzjohn*. (a) This gives the natural meaning to the word "exempted," which cannot be treated as synonymous with "exempt," but implies that there is something in the Act taking the particular case out of the general rule to which it would otherwise be subject. Then, according to the principle in

(a) 2 H. & N. 465.

Arnold v. Arnold, (a) and *Thomson v. Advocate-General*, (b) the words "a legacy bequeathed to him by * the predecessor," must be construed to refer to a legacy of English property bequeathed by the will of an English person. The intention was, that all property which came into possession upon death, after the Act came into operation, should pay succession duty if it escaped legacy duty. *Re Lovelace's Settlement*, (c) has some bearing on the present case, for there your Lordships, dissenting from Vice-Chancellor Wood, held the property liable to duty on the ground that the appointment was to be treated as embodied in the instrument creating the power. It is not the scope of the Act that property situate in England, given by an English will and vested in English trustees, should be free from succession duty merely because it does not pay legacy duty.

Mr. Hinde Palmer and *Mr. Knox Wigram*, for the petitioners. — We contend, first, that, owing to the foreign domicile of Madame Gibaut, legacy duty is not payable. It is true that the disposition by her comes within the express terms of section 7 of the Act, but regard is to be had to the 18th section, which relates to the execution of powers. That section first provides for limited powers, and makes the appointees take as from the creator of the power. Then the following part of the section provides that, where a limited interest is given to a person and a general power of appointment is also given to a person to whom the property would not belong in default of appointment, then if the power is exercised, the property shall be charged with the same duty and in the same manner as if it had been immediately given to the donee of the power. This duty has been paid, the same duty as if the property had been bequeathed to Madame Gibaut, and the Crown so far has treated the case as if the property * had been bequeathed to her. Then again the Statute 7 & * 663 8 Vict. c. 76, § 4, adopts a similar view. The effect of these enactments is, that, for the purpose of charging legacy duty, a person having a general power of appointment and exercising it shall be deemed the absolute owner. To some extent it is so for other purposes, the appointed fund being liable to the appointor's debts. If the donee of the power is to be treated as owner for

(a) 2 My. & Cr. 256, 270.

(c) 4 De G. & J. 340.

(b) 12 Cl. & Fin. 1, 20.

the purpose of imposing duty, he ought to be so for the purpose of exempting the property from duty. Now we submit that the scope of the legacy Acts is to treat a general power as indential with property for the purposes of taxation. In *Platt v. Routh*, (a) an earlier stage of *Drake v. Attorney-General*, the remarks of Lord ABINGER are very strong as to a general power being substantially the same as ownership. Now if this had been Madame Gibaut's own property, it is admitted that, owing to her foreign domicile, no duty would have been payable. Why should not the same rule apply where she has a general power? It is said that the rule only applies to property belonging to the person domiciled abroad, but that only brings us back to the same question, — Is not a general power which is exercised tantamount to ownership for the purposes of taxation? Property which can only be taken subject to the debts of the appointor must be considered to be derived from him; there cannot be any better evidence of the appointor's substantial ownership than the liability of the property to his debts. We contend, therefore, that legacy duty is not payable.

We further say that succession duty is not payable. The case raises the important general question, whether the law of domicile can effect an exemption from succession duty. Now we * 664 admit that the terms of sect. 2 of *the Succession Duty Act are wide enough to take in this case, and that under it duty would be payable if there were nothing more in the Act. But the 4th section provides, that the donee of a general power of appointment who exercises it shall be deemed at the time of exercising it to be entitled to the property as a succession from the donor of the power. This section places Madame Gibaut substantially in the same position as under the Legacy Duty Acts, a successor to her father. It is admitted on both sides that you must look to section 2 for the definition of successor and predecessor, but the 4th section declares that Madame Gibaut is successor to her father on the principle that she is to be deemed to have taken the property from him, thus treating the power, if exercised, as being substantially the same thing as ownership. The 10th section, though a material clause of the Act, does not throw any light on the present question. Then the 18th provides, that succession duty shall not be paid where legacy duty is payable. This

indicates an intention that wills of personalty should as to duty continue to be governed by the Legacy Duty Acts, and that the Succession Duty Act should not interfere with them. That section further provides, that succession duty shall not be payable by any person in respect of the succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from duty under the Legacy Duty Acts. We are somewhat fettered by the decision of the Court of Exchequer in *Attorney-General v. Fitzjohn*, (a) but we submit that the fair construction of "exempted from" is "not liable to," and that the Court of Exchequer construed the expression in too stringent a way, considering especially that it is contained in an Act which taxes the subject. However, after the decision * in *Attorney-General v. Fitzjohn*, we do not rely on the 18th section. But we contend that if by reason of the general principles of law the Legacy Duty Acts do not extend to property of a person domiciled abroad, the same rule ought to be applied to the Succession Duty Act. Now in what respect does Madame Gibaut differ from an ordinary testator? We have considered whether she differs at all under the Legacy Duty Acts, and we contend that as regards succession duty she is, under section 4 of the Succession Duty Act, in the same position as an ordinary testator. *Re Lovelace's Settlement* (b) has been referred to against us, but the decision there did not turn on domicile. What was decided there was that the case did not fall within the 4th section, and that it did fall within the 2d section, it being admitted on both sides that the question of domicile was perfectly immaterial unless the case came within the 4th section, and the Lord Justice TURNER, p. 352, distinctly takes that view in terms which tend to the conclusion that if the case came within section 4, the law of domicile would apply. The present case is indisputably within section 4. Now the 4th section provides that a person having a general power of appointment and exercising it "shall be deemed to be entitled at the time of his exercising such power to the property thereby appointed as a succession derived from the donor of the power." No words could be more appropriate to show that the general power is for the purpose of duty to be deemed tantamount to ownership, and, if so, the principle as to domicile must apply.

(a) 2 H. & N. 465.

(b) 4 De G. & J. 340.

The Attorney-General, in reply. — The observations of Lord LYNDHURST in *Thomson v. Advocate-General* show how * 666 completely inapplicable to * the Succession Duty Act are the reasons held to exempt the personal estate of a person domiciled abroad from the operation of the Legacy Duty Act. Lord LYNDHURST's first reason is, that the legislature in speaking of "legacies" and "wills" is to be supposed to be speaking of legacies given by wills of persons domiciled in this country. But the 2d clause of the Succession Duty Act, which is the governing clause, contains no such reference to wills or legacies, but is expressed in general terms. On broad and general grounds the legislature is to be assumed to be legislating only about property which is the subject of its laws, such as real property, or, as in this case and *Lovelace's Case*, property of a British subject, under a British settlement, vested in British trustees, and falling under the authority of a British Court. The fact that a foreigner may take an interest in such property or that he may have a power of appointment over it cannot exempt it from its liability to duty. Such property does not follow his person so as to be deemed situate wherever he dies domiciled, but follows the person of the trustees and is subject to the law to which they are subject. The only way in which foreign law intervenes is that it may be necessary to have recourse to it to ascertain whether the act of disposition was such as to take effect where it was done. Then the petitioners say that for fiscal purposes general power, if exercised, is identical with ownership. That to a great extent is true, but the letting in the law of domicile, so as to make property not liable to the tax, is not a fiscal purpose. The law intends to provide for the taxation of the inhabitants of the United Kingdom in respect of property within that kingdom which is liable to be governed by English law. It is an extraordinary argument, even under the Legacy Duty Acts, that such property is to be withdrawn from the operation of that law because the immediate interest in it is * 667 derived under * the execution of a power by a foreigner, and under the Succession Duty Act such an argument is still more unfounded. The language of the 4th section, on which the petitioners mainly rely, does not bear the construction which they seek to put upon it. The section introduces the fiction of the appointor being owner for the purpose of taxing the property as a succession devolving upon him, making him the predecessor from

whom the relationship of any subsequent taker is to be reckoned. Stress has been laid upon the rule that taxing Acts are to be construed strictly. I admit that a tax cannot be imposed without sufficient taxing words, but it cannot be denied that here the 2d section contains such words, and it lies on the petitioners to show from other parts of the Act that they are exempted from the operation of those words. There is no intention shown in the Act to benefit foreigners or to exempt from the tax any property which is fairly the subject of British legislation. Now as to the 18th section "exempted" is much the same as "excepted," and does not apply to a thing originally omitted, but to a thing originally included and then taken out. The word clearly applies to the "exemptions" contained in the schedule to the Legacy Duty Acts. The argument founded on the assimilations of general power to ownership in the Legacy Duty Acts can only apply to the taxes imposed by those Acts, and cannot extend to the Succession Duty Act. As to property appointed under a general power being subject to the appointor's debts, there is little force in the argument founded on that; such property is not liable till the whole of the appointor's own property is exhausted; if it were liable in the same degree as the appointor's own estate there might be more force in the argument. As regards the remarks in *Lovelace's Case*, they amount to no more than this, that as the case was not within the 4th section the question of domicile, did * not arise, and * 668 they cannot fairly be construed as expressing any opinion how that question ought to be decided if it did arise.

Judgment reserved.

March 11.

The Lord Justice TURNER, after shortly stating the facts, proceeded as follows:—

The executors of the will of William Wallop have paid legacy duty at the rate of 1l. per cent upon the whole of the residue of his estate. The question now is, whether, in addition to the duty so paid, further duty is payable, either under the Legacy Duty Acts or the Succession Duty Act, on the legacies given by the will of Henrietta Gibaut. The question of course depends upon the different Acts, and must be separately considered with reference to them.

The question as to the legacy duty arises under the Act 36 Geo. 3, c. 52, which, so far as this case is concerned, does not appear to be affected by the subsequent Acts. The sections of this Act, which were referred to in the course of the argument before us, were the 7th and the 18th sections; but it was contended on the part of the Crown that the 18th section has no bearing upon the case before us, and I think it was rightly so contended, for the case of *Platt v. Routh*, (a) as decided in the Exchequer and at the Rolls, and ultimately in the House of Lords, upon the appeal under the title of *Drake v. Attorney-General*, (b) seems to me to have finally settled that the 18th section, so far as it relates to general powers of appointment, applies to the * 669 duties payable by the *donees of the powers, and not to the duties payable by the appointees under the powers, leaving these latter duties to depend upon the 7th section. This case, therefore, in my opinion, wholly depends upon the 7th section. That section provides, "that any gift, by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this Act, whether the same shall be given by way of annuity or in any other form."

Now it is well settled that under this section no duty is payable upon legacies given by the wills of persons domiciled out of Great Britain, and to be paid out of their personal estates; and it is so settled, as I understand the cases, upon the ground that personal estate follows the person. *Thomson v. Advocate-General*; (c) and that the Legacy Duty Acts are to be understood as confined to Great Britain: *Re Ewin*, (d) *Re Bruce*, (e) *Arnold v. Arnold*; (g) but it is said that this rule, although it cannot be disputed as to legacies given by persons domiciled out of Great Britain to be paid out of their personal estates, can have no application to cases like the present, where the legacies are given in exercise of powers, inasmuch as in these latter cases the rule that the property follows

(a) 6 M. & W. 756; 3 Beav. 257.

(b) 10 Cl. & Fin. 257.

(c) 12 Cl. & Fin. 1.

(d) 1 Cr. & Jerv. 151.

(e) 2 Cr. & Jerv. 436.

(g) 2 My. & Cr. 256.

the person can have no application, there being no property in the donees of the powers. It is to be observed, however, that the real question here is, what the legislature intended by the language which it * has used, and this section in terms * 670 applying to legacies given by the wills of persons to be satisfied out of their personal estate, or out of any personal estate which they may have had power to dispose of, thus putting both sets of persons into the same class, it cannot, I think, have been intended by the legislature that a different rule should apply to different members of the class, — that duty should be payable by the appointees under the wills of donees of powers domiciled out of Great Britain, when no duty would be payable by legatees under the wills of those persons to be paid out of their personal estates. I am of opinion, therefore, that no legacy duty is payable in this case; and I think this opinion is fortified by expressions which are to be found in several cases treating appointed funds as the property of the donees of the powers for the purposes of the Legacy Duty Acts.

Is then duty payable in respect of these legacies under the Succession Duty Act? (a) This Act ought not, as it seems to me, to receive the same limited construction as to its applying only to persons domiciled in Great Britain as has been given to the Legacy Duty Acts.

In the case *In re Lovelace's Will* (b) we held the Act to extend to legacies under the will of the donee of a power who was domiciled out of Great Britain; and on reconsidering our determination in that case I see no reason for altering it. Not only is the Act, in the 2d section, which defines what shall be deemed to be a succession, wide and general in its terms, but the definition there given extends to and embraces not only testamentary dispositions but dispositions of every description, and dispositions not only of personal but of real property * also. The Act, therefore, was * 671 clearly intended to extend to cases which can in no way be affected by the rule that *mobilia sequuntur personam*; and it would be very difficult to say that if in the case of real estate devised by a person domiciled out of Great Britain, the devisee would be liable to the duty imposed by this Act (which would clearly be the case according to the terms of the Act), the legatee of the personal

(a) 16 & 17 Vict. c. 51.

(b) 4 De G. & J. 340.

estate of a person so domiciled, or the appointee of a donee of a power so domiciled, was not equally intended to be so liable. The 44th section of the Act, rendering the trustees of the property subject to the duty personally liable, seems to me too, in some degree, to strengthen this view, and it is, I think, much confirmed by the exemption clause, section 18, which points out the cases in which the duty is not to be chargeable. I adhere, therefore, to our determination in the case of *Re Lovelace's Will*, and am of opinion that by the 2d section of the Act the legatees of persons domiciled out of Great Britain and the appointees by will of the donees of powers so domiciled were intended to be made subject to the payment of the duty.

The question, therefore, is reduced to this, whether by any subsequent provision of the Act the legatees in this case are exempted from such payment? And this depends upon the 18th section of the Act. By that section no duty is to be payable by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts.

It was contended upon this section, that inasmuch as in this case no duty would be payable in respect of these legacies * 672 under the Legacy Duty Acts, by reason of the * donee of the power having been domiciled out of Great Britain, no succession duty could be payable either in respect of them. But in the case of the *Attorney-General v. Fitzjohn (a)* it was held that the exemptions referred to by this 18th section were the special exemptions given by the Legacy Duty Acts, and that the section did not extend to cases in which no duty was imposed by those Acts in effect, that the word "exempted" must be construed in its natural sense, and not as meaning "exempt" in contradistinction to "exempted." From this decision I am not prepared to dissent, and I think, therefore, that the legatees' argument on this point cannot be maintained. Failing this argument I can find nothing which can protect these legatees from the payment of the succession duty, and I am of opinion, therefore, that the duty is payable upon those sums.

I think, therefore, that the order should be for payment of the succession duty on the legacies of 3000*l.* and 1000*l.*, and, no duty

being claimed in respect of the residue given by the will, for the payment to Moses Gibaut of the rest of the fund in Court.

THE LORD JUSTICE KNIGHT BRUCE. — In this case, without saying whether I concur or do not concur in all the observations that have been made by my learned brother in disposing of it, my impression is, that the two legacies in question are subject, either to legacy duty, or to succession duty at the same rate, and it seems of no importance practically to the ladies or to the Crown which; I think, accordingly, that I may join in my learned brother's conclusion, so as not to leave the case undecided; but if we can avoid giving costs to the * Crown I had rather that the * 673 Crown should have no costs.

Mr. Hanson, for the Crown, stated that he did not ask for costs.

In the Matter of EDMUND LECHMERE PUGH, a solicitor.

Ex parte BRISCOE.

1863. April 18. June 2. Before the LORDS JUSTICES.

On the day fixed for the completion, at a solicitor's office, of the sale of a mortgaged property belonging to a former client, the solicitor delivered to the former client, who was in somewhat embarrassed circumstances, his bill of costs. The client and his new solicitor attended, and in order to prevent the postponement of the completion, allowed the solicitor to retain the amount of his bill, but under protest. The bill contained overcharges to a considerable amount. *Held*, that the bill was paid under circumstances of pressure, and that taxation ought to be ordered.¹

THIS was an appeal by a solicitor from an order of the Master of the Rolls, directing taxation of his bill after payment.

The petition was presented for the taxation of two bills under the following circumstances:—

In December, 1861, the petitioner employed Mr. Pugh, a solicitor, to obtain him a loan of 500*l.* on the security of a reversionary interest. Mr. Pugh advanced the money himself on that security,

¹ See *Kerr F. & M.* (1st Am. ed.) 166, 167.

and in January, 1862, paid to the petitioner 41*l.* 10*s.* 10*d.*, having retained 89*l.* 9*s.* 2*d.* for his bill of costs, which bill was delivered on the 20th of the same month.

The petitioner continued to employ Mr. Pugh as his solicitor till March, 1862, but from that time employed another solicitor.

* 674 On the 19th of May, 1862, the property in mortgage * to Mr. Pugh was sold by auction, and the 27th of June was the day fixed for completion at the office of Mr. Pugh at Worcester. On that day the purchaser and his solicitor came over from Wrexham to complete. Mr. Pugh on that occasion, and not before, produced his bill of costs, though it had been applied for before that time. He had, however, previously given to the petitioner an estimate of what its amount would be. It amounted to 113*l.* 14*s.* 5*d.* It appeared from the evidence that the petitioner was in somewhat embarrassed circumstances and in immediate want of money. The petitioner and his solicitor both attended the meeting, and in order to prevent a postponement of the completion of the purchase allowed Mr. Pugh to retain the amount of his bill out of the purchase-money, but under protest as to the amount. Whether Mr. Pugh expressly refused to let the business proceed unless his bill was paid was in dispute. On the 16th of December, 1862, the petition was presented for the taxation of both bills. The delay was accounted for by the death of the petitioner's father soon after the payment and by the petitioner's embarrassments.

The Master of the Rolls decided that the petitioner was not entitled to have the earlier bill taxed, but he directed a taxation of the second bill, and gave to neither party any costs of the petition. (a)

Mr. Pugh presented a petition by way of appeal from this order. On the 18th of April their Lordships directed that the taxation should proceed without prejudice. The result was, that of the 113*l.* 14*s.* 5*d.* the amount of 38*l.* 7*s.* 6*d.* was taxed off.

* 675 * *Mr. Southgate* and *Mr. Elderton*, for the appellant. — This is not a case of pressure, and the Master of the Rolls gives no further reason for ordering taxation than that the bill was paid on the day on which it was delivered. After payment there must, in order to justify taxation, be either pressure and overcharge, or over-

charges amounting to fraud. *Re Hubbard*. (a) What amounts to fraud is defined by *Re Barrow*, (b) *Re Browne*, (c) *Re Stirke*. (d) Here more than one-sixth has been taxed off, but there is nothing like overcharge so gross as to amount to fraud. As regards the first bill no case for taxation at all is made. As regards the second, the case made on the petition is, that the amount was retained against the will of the client, but that is not the case made out on the evidence. As regards payment on the day of delivery, the bill was paid through a solicitor three months after the relation of solicitor and client had ceased between the appellant and the respondent. It would not be wholesome to establish a rule, that a bill which contains items reaching down to the day of its delivery is taxable simply because it is paid on that day, when the client had professional advice at the time of paying it. There was here no jurisdiction to tax at all: *Barwell v. Brooks*; (e) but if there was, the delay in applying is not accounted for; the petitioner makes no case of having discovered overcharges of which he was not at first aware. In the case of *Re Barnard*, (g) overcharges were held not enough. In *Ex parte Wilkinson*, (h) there was actual pressure and payment under protest. *Re Finch*, (i) *Re Fyson*, (k) which is very * similar to this case, and *Re Boyle*, (l) are all in our favour. * 676

Mr. Bacon and *Mr. Roberts*, for Mr. Briscoe. — The result of the taxation shows that the bill was most exorbitant, more than two-sixths having been taxed off. There was pressure, for the bill was produced for the first time at the settlement of a purchase, when there was practically no option whether to pay or not. The bill contained charges which ought not to have been made, for large items have been wholly struck out, for instance 6l. for a supplemental abstract. Our case is supported by *Re Tryon*, (m) *Re Wells*, (n) *Re Bennett*, (o) *Re Jones*, (p) *Re Philpotts*, (q) *Re*

(a) 15 Beav. 251.

(b) 17 Beav. 547.

(c) 1 De G., M. & G. 322.

(d) 11 Beav. 304.

(e) 8 Beav. 121.

(g) 2 De G., M. & G. 359.

(h) 2 Coll. 92.

(i) 4 De G., M. & G. 108.

(k) 9 Beav. 117.

(l) 5 De G., M. & G. 540.

(m) 7 Beav. 496.

(n) 8 Beav. 416.

(o) *Ib.* 467.

(p) 8 Beav. 479.

(q) 18 Beav. 84.

Loughborough, (a) Re Lart, (b) Ex parte Walker, Re Foster. (c)

Mr. Southgate, in reply.—In *Ex parte Walker, Re Foster*, there were strong circumstances of pressure such as do not exist here.

THE LORD JUSTICE KNIGHT BRUCE. — The taxation having been ordered to proceed without prejudice to any question, I desire to deal with the matter as if no taxation had taken place, but subject to this observation, that in my opinion the taxation has not produced any thing favourable to the appellant's case. Now * 677 looking at the bill as untaxed, considering the * date of the earliest item of the bill, the position in which the parties stood to each other, and the nature of the business done and of the charges made, I should have said that it was a very high bill. In what circumstances then was it delivered and paid? The bill according to Mr. Pugh's affidavit had probably been asked for on the day before and not merely on the day of the settlement of the purchase. I do not know whether Mr. Pugh was to blame or not, but so it was that the bill was not delivered until the meeting at Mr. Pugh's office. The purchaser's solicitor was in attendance, having come from Wrexham for the purpose of completing, and if the completion had been delayed considerable inconvenience and expense would probably have been occasioned. It is to be remarked also that, so far at least as my judgment goes, it is a just inference from the evidence, that Mr. Briscoe was a gentleman in straitened circumstances, somewhat pressed by debts, and to whom an early settlement was important; and taking the evidence as to what took place at the meeting in the view most favourable to Mr. Pugh, it seems to me that the bill was paid in circumstances of pressure. In saying this I do not mean any thing disparaging to the character or conduct of Mr. Pugh, but still I think that neither Mr. Briscoe nor his solicitor was altogether a free agent in the matter. When to this is added the lateness of the delivery of the bill, and the nature of the bill itself, apart from the result of the taxation which has taken place, I think that the case is one for taxation. It comes, however, very near the line. The delay is a matter for

(a) 23 Beav. 439.

(c) 2 De G., F. & J. 105.

(b) 31 Beav. 488.

observation, but I do not think that it is sufficient to bar the petitioner's title to relief. I am of opinion that the order of the Master of the Rolls was right, both in directing taxation and in not giving any costs down to the time of the order. Mr. Pugh must pay the costs of * the taxation, but I do not think it a case for * 678 ordering him to pay the costs of the appeal.

THE LORD JUSTICE TURNER. — I agree, and for reasons so precisely the same that I do not think it necessary to add any thing.

WALSHAM v. STANTON.

1863. November 5, 6, 14. Before the LORDS JUSTICES.

J. S. and H. S., who were confidential agents of a company, conspired together to depress the selling price of the shares by a system of false accounts and concealment, in order that they might purchase them at an undervalue. By reason of this scheme, fifty-five shares belonging to G. were sold much below their real value, fifteen to J. S. and forty to H. S. The executor of G., upon discovering the frauds which had been practised, filed his bill against the executor of J. S. and the executors of H. S. for relief in respect of all the shares. The representative of J. S. demurred for want of equity and multifariousness. *Held*, that although J. S. derived no benefit from the sale of the forty shares at an undervalue, yet, as he stood in a fiduciary position towards the shareholders, and was a party to the fraud, he, as well as H. S., was liable to G. for the real value of the shares, and that his executor was a proper party to a suit in respect of them¹. *Held*, also, that as both sales were affected by the same fraud, it was not multifarious to combine the cases as to the fifteen and the forty shares in the same bill.²

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor Wood allowing a demurrer by William Horn, the legal personal representative of Joseph Stainton, without giving leave to amend.

¹ See Kerr F. & M. (1st Am. ed.) 371, 379, 380, 381.

² See 1 Dan. Ch. Pr. (4th Am. ed.) 337-344; *Hamp v. Robinson*, 3 De G., J. & S. 97; *Way v. Bragaw*, 1 C. E. Green (N. J.), 213, 216; *Randolph v. Daly*, 1 C. E. Green (N. J.), 313; *Chase v. Searles*, 45 N. H. 511, 519; *Coleman v. Barnes*, 5 Allen, 374; *Richards v. Pierce*, 52 Maine, 560; *Kennebec and Portland R.R. Co. v. Portland and Kennebec R.R. Co.*, 54 Maine, 173; *Hicks v. Campbell*, 4 C. E. Green (N. J.), 183; *Adams's Eq.* (5th Am. ed.) [310], 602, note (1), and cases cited.

The substance of the bill, the defendants to which were the executors of Henry Stainton, the Carron Company, the manager of the company and the executors of Joseph Stainton, was as follows:—

The Carron Company is a corporation incorporated in 1773 by royal charter, and its affairs are regulated by the charter and two deeds dated respectively 19th January, 1760, and 6th May, 1771.

* 679 * By the latter deed the capital of the company was fixed at 150,000*l.* to be divided into 600 shares of 250*l.* each; and no future partner was to have any vote in the management or any right to examine the books unless he held at least ten shares; every holder of ten shares or more was to have one vote for every 2500*l.* of capital he should be possessed of. Books were to be kept by the manager for the time being and balanced at least once a year. Two general meetings were to be held every year at Carron; at the October meeting the accounts were to be examined and a committee of management appointed, which was to meet once a month, and part of whose business was to be “to receive all intimations with regard to the sale or disposal of any part of the stock of the company.” All shareholders present and future were to be at liberty to sell their shares or any number not less than two of them, on the following conditions: A shareholder wishing to sell was to make intimation in writing to a monthly meeting of the number of shares he proposed to sell, and the price at which he proposed to sell them, and if the company or any shareholder entitled to vote chose to buy them at that price before the second monthly meeting they and he were to be at liberty to do so, but if not, then the shares might be sold to anybody, provided they were not sold at a lower price than that at which they had been offered as above without first offering them at such lower rate to the company or the shareholders entitled to vote, and no sale of any shares to strangers was to take place till such last-mentioned offer had been made at a monthly committee and rejected by the second following one, and so on, so that no shares could ever be sold to strangers without the company and partners entitled to vote having had an opportunity of purchasing them at the same price. Shares sold or attempted to be sold in contravention of this rule

* 680 were * to be *ipso facto* forfeited to the company. By another clause the right which had been given by the former deed to

all the partners, of inspecting the books at their pleasure, was confined to the then partners, every partner present or future who was entitled to vote in the direction of the company's affairs retaining a right to attend the meetings of a monthly committee, and to see and examine the proceedings had by them; and it was, therefore, expressly provided and declared, that the company's books should be only open to the inspection of the then present partners, and of the monthly committees at their meetings, or of any member having authority or commission from the committees to examine the same, with a proviso that any two partners holding not less than twenty shares might obtain such authority from the committees on proper cause shown.

The charter directed that 1*l*. per cent on the gross sales might be set aside as a reserve fund, and that the residue of annual profits should be disposed of as the general meetings should direct.

Francis Garbett was one of the original shareholders in the company, and one of the persons mentioned as a shareholder in the charter of incorporation. He was, in the month of March, 1771, the holder of fifty-five shares in the company, and in March, 1771, he assigned these shares to Glyn & Co. to secure the balance of a current account due from the firm of Francis Garbett & Co., of which he was a member, but no transfer of these shares in the books of the company was made.

Francis Garbett and two other shareholders in the company had, in the year 1770, granted bonds for sums amounting to about 22,000*l*. to L. Grant, as trustee for the creditors of two persons of the name of Fairholme. * Charles Selkrig was afterwards appointed trustee in his room. * 681

Francis Garbett died on the 9th of January, 1800, and the plaintiff was his legal personal representative both in England and Scotland.

In the year 1806 Selkrig, without notice to any one interested in Francis Garbett's estate, procured himself to be made executor creditor in Scotland on behalf of the Fairholmes to Francis Garbett to the extent of forty of the said fifty-five shares.

Joseph Stainton was manager of the company at Carron from 1786 to his death in 1825, and his brother Henry Stainton was London agent of the company from 1808 till his death in 1851.

The half-yearly Courts of the company were duly held, but in many respects the provisions of the charter and deeds were not

observed. The last monthly committee meeting took place in 1813, and since that year no such committee had ever been appointed. The committee never held monthly meetings, but met very irregularly, about five or six times a year on an average.

In April, 1813, Glyn & Co. offered to sell thirty of the said fifty-five shares to the company or the partners at 133 $\frac{1}{2}$ per cent, reserving the dividends for the last half-year.

Joseph Stainton at a general meeting on the 29th of June, 1813, agreed to be the purchaser of these thirty shares. In January, 1815, fifteen of such shares were transferred to him by deed with the privity of Henry Stainton; and at a meeting held on * 682 the 3d of February, * 1815, at which Joseph Stainton alone was present, holding proxies for six others, including Henry Stainton, a resolution was passed for the transfer of the shares to Joseph Stainton in the books of the company.

At a similarly constituted meeting held on the 15th of June, 1815, Joseph Stainton produced a power of attorney from Glyn & Co. authorizing Alexander Smith to receive the dividends which might become due to Glyn & Co. under the dispositions made by F. Garbett.

On the 29th of September, 1817, Selkrig offered the remaining forty shares for sale to the company or partners for 130 $\frac{1}{2}$ per cent, which offer was afterwards accepted by Henry Stainton, and the purchase was ratified at a general meeting on the 10th of December, 1817, at which Joseph Stainton (with the same six proxies) and Joseph Dawson alone were present. These forty shares were afterwards transferred in the books of the company to Henry Stainton.

The accounts and books required by the charter and deeds of settlement were regularly kept and balanced, but the accounts of the agents of the company were not examined with the vouchers or certified as correct. As regarded the accounts at Carron it was the custom of Joseph Stainton to make out half-yearly balance sheets, which were submitted to the next general meeting, and compared with the ledger by the bookkeeper and two members of the company, one of whom was usually the manager, and the other the president of the meeting; and if the balance sheets agreed with the ledger, a certificate thereof was entered in the books of the company and signed.

Henry Stainton, who was one of the largest shareholders,

* was frequently the president of the general meetings, * 683 and as such was often one of the persons who compared the balance sheets with the ledger and certified the result in the books of the company.

From 1805 to 1839, both inclusive, an unvarying dividend at the rate of 9l. per cent per annum was paid.

Joseph Stainton died in 1825, and the demurring defendant William Horn was his legal personal representative in England as well as Scotland.

Henry Stainton died in 1841, and the remaining defendants (other than the Carron Company and its manager) were his legal personal representatives.

The plaintiff in July, 1860, for the first time discovered the circumstances thereafter mentioned, on the ground of which he alleged that the sales of the fifteen shares to Joseph Stainton and of the forty shares to Henry Stainton were fraudulent and void.

Joseph Stainton from the time of his becoming manager at Carron introduced from time to time into the company his own immediate relations, and obtained by his influence their appointment to fill all offices of trust therein, and in particular his nephews Joseph Dawson and Henry Dawson were appointed to confidential situations.

Joseph Stainton and Henry Stainton, taking advantage of their respective positions in the company and in collusion with the Dawsons, entered, long previous to the year 1815, into a scheme to secure to themselves the whole benefit of the company, and with that view conspired together to procure the discontinuance of the committees of management, where proxies were not allowed, * and to keep the accounts of the company fraudulently, so * 684 as to conceal from the shareholders the real value of the shares, in order that they themselves might buy up at an under-value such shares as were offered for sale, and at the same time make themselves a majority of votes at the meetings of the company.

Such fraudulent scheme was carried into effect in the following manner: Henry Stainton had, long before the year 1815, with the knowledge and privity of and acting in collusion with Joseph Stainton and the Dawsons, retained in his own hands a very large fund belonging to the company, but which did not appear in the books of the company at Carron. The bill stated in detail how

this fund arose, but it will be sufficient for the present purpose to state that Joseph Stainton entered in the books of the company large quantities of goods sold to the board of ordnance at prices much less than those actually paid, and invested the difference in his own name in government stock. This was carried on with the help of Henry Stainton, as manager in London. This fund, called in the bill "the secret reserve fund," amounted in 1808 to 80,000*l.*, and in 1816 to 120,000*l.* The existence of this fund was not noticed in the books of the company, nor was it known to any member of the company, other than the Staintons and the Dawsons, until the year 1852; but after that date its existence was disclosed, and it was subsequently paid or accounted for to the company.

Henry and Joseph Stainton, between the years 1808 and 1817, retained in their hands other large sums belonging to the company which they did not account for to the company, and in their accounts rendered to the company they understated the value of its property.

* 685 * Before the half-yearly meetings, Henry Stainton used to be furnished by Joseph Dawson, under the directions of Joseph Stainton, with "trial" balance sheets of the company. These balance sheets were not intended to be adopted nor shown to the other managing partners, but were meant to put Henry Stainton in possession of the true state of the accounts, so as to enable him to prepare fictitious balance sheets for adoption by the meetings.

Under these circumstances the amount of profit was never accurately stated in the balance sheets, and the real value of the shares in the company was not known.

After the death of Henry Stainton proceedings were instituted by the Carron Company against his estate, which were compromised by his executors paying 220,000*l.* to the company, and a further sum is still claimed by the company.

Under these circumstances, the said fifteen and forty shares were purchased by Joseph and Henry Stainton at a great under-value.

At the time of filing the bill, the forty shares remained in the name of Henry Stainton, but the fifteen shares sold to Joseph Stainton had been resold by his executors.

The bill also contained allegations for the purpose of explaining

the delay in bringing the suit, and of negating certain anticipated defences not material to the question raised by the demurrer, and alleged that Glyn & Co. had been paid, and disclaimed all interest in the matters in question in this suit. The bill then prayed to the following effect:—

1. That the sale of the forty shares to Henry Stainton * might be set aside, and the shares retransferred to the * 686 plaintiff.
2. That it might be declared that the sale of the fifteen shares was fraudulently obtained, and that the estates of Henry Stainton and Joseph Stainton were jointly and severally liable to make good to the plaintiff the difference between the purchase-money paid by Joseph Stainton for the shares, and the actual value thereof at the time of sale, and that their respective executors might be decreed to make good the same.
3. An account of dividends and bonuses paid in respect of such shares since the respective sales thereof.
4. An injunction restraining Henry Stainton's executors from transferring the forty shares.
5. An injunction restraining the Carron Company from refusing to permit or concur in a transfer of these shares to the plaintiff.
6. That the defendants, other than the Carron Company, might pay the costs.

The Defendant Horn demurred to this bill for want of equity and multifariousness, and Vice-Chancellor Wood allowed the demurrer, refusing leave to amend. (a)

Mr. Giffard and *Mr. Eddis*, for the plaintiff, in support of the appeal.— Joseph Stainton, being manager of the company, stood in a fiduciary position towards the shareholders, and Henry Stainton, being a confidential agent of the company, was in a similar position. They combined together in a system of fraud and misrepresentation by which the value of the shares was much reduced, and the holders * were led to sell them for a very * 687 inadequate consideration. The sales of the forty shares and the fifteen shares are connected, the undervalue in each case

having been occasioned by the same fraud. Joseph Stainton derived no pecuniary benefit from the sale of the forty shares at an undervalue, but having been manager of the company, and having been guilty of a fraud which occasioned the loss on the sale, he was liable to make it good, and his representative cannot be heard to say that he is not a proper party to the suit, so far as it relates to the forty shares. *Attorney-General v. Cradock. (a)*

Sir H. M. Cairns and *Mr. John Pearson*, for the demurring defendant. — As to the fifteen shares, the absence of Glyn & Co. is fatal to the suit. Joseph Stainton purchased from them. There is no allegation that they were parties to the fraud; if they had been, the sale would have been impeachable,—but not without bringing them here. They were the sellers, but there is no allegation that they were ignorant of the true value of the shares, or that any fraud was practised on them. The averments as to ignorance of the existence of the reserve fund name everybody interested except Glyn & Co. No fraud *dans locum contractui* is alleged at all, nothing which would cause the price of the shares to be fixed too low. Apart, therefore, from the defect of parties the bill makes no case for impeaching the sale of the fifteen shares. Then as to the forty shares, Joseph Stainton is not connected with them. The Vice-Chancellor considered that there was no jurisdiction in equity to give damages against the representatives of a deceased person on the ground that he had made representations which enabled some one else to get the plaintiff's property at an undervalue. *The proper remedy, if any, against the person making such representations is an action of deceit. The forty shares are remaining *in specie*, and the bill should have been against Henry Stainton's representatives only to obtain a retransfer. The Court will not give damages against the representatives of Joseph Stainton who received no benefit. *Bishop of Winchester v. Knight, (b) Powell v. Aikin. (c)*

Mr. Giffard, in reply. — The proposition contended for on the other side is, that if a mortgagee is deluded into an improvident sale, the mortgagor who is the person really injured has no remedy. It is needless to reply to such a proposition. Then as to keeping

(a) 3 My. & Cr. 85.

(c) 4 K. & J. 343.

(b) 1 P. Wms. 406.

the representatives of Joseph Stainton before the Court ; a person in the position of a trustee is liable in equity for a breach of duty, and so are his representatives, though he may have derived no benefit from it. *Montford v. Lord Cadogan.* (a) A director is a trustee, his office differing from that of an ordinary trustee, not in the nature of its obligations, but in the character of the duties which he has to perform. The concealment practised in this case was one which reduced the dividends, and therefore necessarily affected the price of the shares.

Judgment reserved.

November 14.

THE LORD JUSTICE KNIGHT BRUCE. — The allegations of the bill in this case, if taken as true, appear to me to show that a relation of confidence * as to property existed between Mr. * 689 Garbett (whom the plaintiff represents) on one hand, and Mr. Joseph Stainton and Mr. Henry Stainton, of whom the former is represented by the demurring defendant, on the other hand ; that acts of fraud, to the prejudice of Mr. Garbett, were committed by Mr. Henry Stainton and Mr. Joseph Stainton, with respect to that property in the course of that relation by means of an abuse of it ; and that as to these acts, on the part of each of them, the two were so associated together as to entitle the plaintiff to proceed in equity by one suit against the personal representatives respectively of Joseph and of Henry Stainton.

I think that the demurrer should be overruled, but I have no objection to reserving to the demurring defendant the benefit of it at the hearing of the cause, a course which, whatever its meaning or effect, has on several occasions been taken in the Court of Chancery.

THE LORD JUSTICE TURNER. — This case is so fully reported in Hemming and Miller's Reports, and has been so recently before us, that it is unnecessary to state the facts. The demurrer is by the personal representative of Joseph Stainton, for want of equity and for multifariousness.

So far as the demurrer rests on want of equity it will be suffi-

cient, as it seems to me, to consider the case as it is stated with reference to the forty shares purchased by Henry Stainton. The case stated by the bill as to these shares cannot be represented as standing lower than this, that two confidential agents of the partnership, Joseph Stainton and Henry Stainton, conspired together to obtain for themselves the shares of the partners in the concern, at an undervalue, by keeping the accounts of
 * 690 the * partnership fraudulently, so as to conceal from the partners the true value of the shares, and that it was by means of this fraudulent conspiracy, the detailed workings of which are fully stated in the bill, these forty shares were obtained by Henry Stainton at a price far below their real value. We are to consider then whether, in this state of circumstances, the estate of Joseph Stainton is or is not liable in equity to account to the plaintiff for the dividends and bonuses which have accrued upon these forty shares since the transfer of them to Henry Stainton, and I am of opinion that the estate of Joseph Stainton is so liable. A more gross breach of duty, on the part of an agent towards his principal, than is disclosed by this bill, cannot well be conceived, and it is not denied (at least the Vice-Chancellor has not denied) that there would be a remedy at law against Joseph Stainton and his estate in respect of this breach of duty, but with all deference to his Honor's judgment, there is at least a concurrent jurisdiction in equity in the case of fraud by an agent upon his principal, and certainly, I am not prepared to agree to the doctrine that, where two agents concur in a fraud, and one of them only derives benefit from the fraud, the other is not liable in equity for the benefit so derived. Agents are, in a sense, trustees; they owe to their principal a similar duty to that which trustees owe to their *cestui que trust*, and it could hardly, I think, be doubted that if this case be looked at as one of trust, and not of mere agency, the estate of Joseph Stainton would be liable for the benefits which accrued to Henry Stainton's estate.¹

Upon these grounds, my opinion is, that there is a sufficient equity to maintain this bill as to the forty shares, and it is unnecessary therefore to consider how the case stands upon the bill as to the fifteen shares purchased by Joseph Stainton.
 * 691 Possibly the bill may be * advantageously amended as to that part of the case. Length of time was not much, if at

¹ See Kerr F. & M. (1st Am. ed.) 172.

all, relied upon in support of the demurrer in the course of the argument before us, and the allegations of the bill seem to meet any argument which could have been founded upon it. It was, however, much insisted upon in support of the demurrer, that it was fatal to the plaintiff's case as to the forty shares that there was no allegation in the bill of fraud upon Selkrig, by whom those shares were sold; but this is a case of impeaching a sale, not for fraud in the mortgagee, but for fraud in the purchaser, which affects the mortgagor no less than the mortgagee.

There remains then only the question of multifariousness, and, in my opinion, the demurrer fails upon this ground also. It is true that there are separate purchases of the fifteen shares and the forty shares, but these separate purchases are alleged by the bill to have resulted from a fraudulent contrivance, which is common to both, and it is in respect of that fraud that relief is sought. The rule as to multifariousness does not, I think, apply to such a case. This demurrer, therefore, ought, in my opinion, to be overruled; the costs of the demurrer, and of the appeal, to be dealt with by the Vice-Chancellor.



AN INDEX
TO
THE PRINCIPAL MATTERS
CONTAINED IN THIS VOLUME.

ACCOUNT. See TRADE-MARK.

ACQUIESCENCE.

A trustee permitted his co-trustee, the father of one of the *cestuis que trust-ent*, to sell out the trust fund, the co-trustee depositing with him a packet of title-deeds by way of indemnity. The son on coming of age, in 1851, had an interview with the trustee upon the subject. In 1855, the father, when dangerously ill, spoke to the son, about the breach of trust, and desired him to call on the trustee, and obtain from him and keep the packet of deeds, which the son did. The son afterwards received a letter from his father, while still dangerously ill, requesting the son, in the event of the father's death, not to hold the trustee responsible, and enclosing the form of a memorandum for the son to copy, and sign, and send to the trustee, and by which the son, in consideration of the delivery up of the deeds, discharged the trustee from all liability. The father died in 1859, and in 1861 the son filed a bill, seeking to make the trustee liable for the breach of trust. *Held*, that the son had by his conduct so acquiesced in the breach of trust as to preclude him from complaining of it. — *Farrant v. Blanchford*, 107.

ACT OF BANKRUPTCY. See BANKRUPTCY, 1.

ADMINISTRATION OF ASSETS.

The testator was a partner in a trading firm, and shortly after his * death the surviving partner became bankrupt. A dividend was * 694 paid on the joint debts, and after the joint estate had been fully distributed a decree was made for the administration of the testator's estate. *Held*, that the joint creditors were not entitled to prove under the decree for the unpaid residue of their debts *pari passu* with the testator's separate creditors, but must be postponed to them. — *Lodge v. Prichard*, 610.

See EXONERATION.

ADMISSION. See LIMITATIONS (STATUTE OF), 1, 2.

ADVANCES.

A testator sold to his daughter's husband a business, which the testator had purchased, for sums secured by promissory notes, payable five years

after date. The testator also became security for the husband to a banking company. The husband became bankrupt, and the testator proved his debt under the bankruptcy. Afterwards he made his will, giving his property upon trusts for his children, but declaring that, in case he should have made any advance of money to any of his children or to the husbands of his daughters, such child should not be entitled to receive any part or share of the testator's property until he, she, or they should have brought into hotchpot such sums of money as should have been so advanced, with interest. Before the promissory notes became due, but after the testator had been obliged to pay the debt to the banking company for which he was surety, *Held*, —

1st. That the amounts due on the promissory notes were not advances to be brought into hotchpot.

2d. That the money paid to the banking company was an advance, and was not extinguished or deprived of that character by the bankruptcy, but must be brought into hotchpot. — *Auster v. Powell*, 99.

AGENT. See FRAUD.

AMENDMENT (AT HEARING). See PRACTICE, 3.

APPEAL. See PRACTICE, 1.

APPEAL (DIRECT FROM CHAMBERS). See PRACTICE, 5, 6.

APPEAL (STAYING PROCEEDINGS PENDING). See PRACTICE, 9.

APPEAL (TIME FOR). See GENERAL ORDERS, 3.

APPOINTMENT. See POWER, 2.

ARREARS. See LIMITATIONS (STATUTE OF), 2.

* 695 * ASSETS. See ADMINISTRATION OF ASSETS.

ASSIGNMENT. See BANKRUPTCY, 1.

ASSURANCE. See POLICY.

BANKRUPTCY.

1. An assignment of the principal part of the assignor's property may be an act of bankruptcy, although not executed by the assignor spontaneously, if it appear that the provisions of the deed must necessarily have the effect of delaying and defeating the assignor's creditors. And where such an assignment was made to trustees, one of whom was an accountant employed with a view to and under the assignment, upon trust out of the proceeds of the assigned property in the first place to pay all costs, charges, and expenses due or to become due to the assignor's solicitor, and the professional charges of the accountant-trustee, and other expenses, and subject thereto to divide the proceeds ratably among the creditors who should execute the deed, and the deed recited that the assignor was not prepared to pay his debts in full: *Held*, that the necessary effect of the deed was to defeat and delay the creditors, and that it was an act of bankruptcy.

An assignment of the principal part of the assignor's property for the benefit of creditors may be given in evidence as an act of bankruptcy, although not registered under the Bankruptcy Act, 1861. — *Ex parte Wensley*, *In re Wensley*, 273.

2. The 32d of the General Orders in Bankruptcy of 6th November, 1861, providing that no new evidence shall be received on any appeal, unless the Court of appeal shall, on the hearing thereof, so direct, applies to evidence upon the matters in issue, and not to evidence as to what took place in the Court below.

In the former case some ground must be shown for the admission of the new evidence.

It is not necessary that a notice of motion by way of appeal, on the ground, among others, of the rejection of evidence should state that ground. — *Ex parte Page, In re Neal*, 283.

3. The commissioner has power either under the 136th section of the Bankruptcy Act, 1861, or, irrespectively of that section, by virtue of his authority over the trustee appointed by a trust-deed within the Act, to direct the trustee to be examined as to his dealings with the debtor's estate: and although it will be a good practice not to direct such examination without some ground being shown for it, the Court of appeal will not in general entertain an appeal as to the sufficiency of such ground. — *Ex parte Lawrence, In re Beale's Assignment*, 307.

- * 4. The 153d section of the Act of 1861, providing for the admission of a proof when a bankrupt is, at the date of the adjudication, liable to a demand in the nature of damages which are unliquidated, only applies to cases in which the cause of action is complete before the adjudication. — *Ex parte Mendel, In re Moor's Assignment*, 330.

BILL OF COSTS. See **TAXATION**.

BREACH OF TRUST. See **ACQUIESCENCE**.

CERTIFICATE OF CHIEF CLERK.

An inquiry having been directed what was due from the defendants to the plaintiff for work done and materials supplied under several contracts, the chief clerk by his certificate simply stated the amounts which he found to be due on the several contracts, without giving any further particulars or stating any grounds for his conclusion. *Held*, that the certificate ought to have been in such a form as to enable the Court to decide whether a correct result had been arrived at, and it was accordingly discharged without prejudice to any question. — *Macintosh v. The Great Western Railway Company*, 443.

CHAMBERS. See **CERTIFICATE (OF CHIEF CLERK)**.

CHAMBERS (APPEAL FROM). See **PRACTICE**, 5, 6.

CHARGE. See **JUDGMENT DEBT**. **POLICY OF INSURANCE**.

CHIEF CLERK. See **CERTIFICATE OF CHIEF CLERK**.

CHILDREN. See **WILL**, 2.

COMMITTEE. See **LUNACY**, 2.

COMPANY (ACQUIESCENCE BY). See **CONTRIBUTORY**, 3.

COMPANY (PURCHASE OF SHARES BY). See **CONTRIBUTORY**, 1, 3.

COMPOSITION DEED.

1. A conditional assent on the part of a creditor to a deed intended to

operate under the 192d section of the Bankruptcy Act, 1861, cannot, so long as the condition remains unfulfilled, be reckoned in calculating the statutory majority of creditors mentioned in the first of the conditions specified in that section.

Per L. J. KNIGHT BRUCE. — The question whether all those conditions have been complied with may be raised, notwithstanding the certificate of registration, and without setting it aside.

* 697 *Per* L. J. TURNER. — The 192d * section extends to deeds of composition, although there may be no *cessio bonorum*. But the composition must be with all the creditors; and where a deed recited an agreement that sureties, parties to the deed, should pay the creditors a specified money composition to be accepted in discharge of the debts by instalments, and the delivery to the creditors, parties to the deed, of promissory notes for securing the instalments; and the creditors, parties to the deed, covenanted that the composition should be accepted in discharge of their respective debts, the amounts of which were specified in the schedule to the deed: *Held, per* L. J. TURNER, that the composition was not with all the creditors, there being no means afforded to non-assenting creditors of obtaining payment of the composition, or any note for securing such payment.

Per L. J. KNIGHT BRUCE. — Where there is only a doubt as to the validity of an adjudication, the proper course still is not to annul. — *Ex parte Rawlings, In re Rawlings*, 225.

2. The word “creditors” in the first condition specified in the 192d section of the Bankruptcy Act, 1861, means and extends to creditors holding security, good or bad, sufficient or insufficient, as well as creditors wholly without security; and in reckoning the proportion of assenting creditors under that section, the debts due to secured as well as unsecured creditors must be taken into account.

Per L. J. KNIGHT BRUCE. — It is not necessary to apply to set aside the registration and certificate of registration of a deed intended to operate under the 192d section of the Bankruptcy Act, 1861, before questioning the fulfilment of the conditions imposed by that section.

Per L. J. TURNER. — In order to be binding on all the creditors under the provisions of the 192d section of the Bankruptcy Act, 1861, composition deeds must extend to all the creditors.

Semble, per L. J. KNIGHT BRUCE, that under the Bankruptcy Act, 1861, the Court of Bankruptcy has jurisdiction to discharge out of custody a debtor who, after having executed a deed of composition in conformity with the 192d section, is arrested by a creditor without the leave of the Court of Bankruptcy. — *Ex parte Godden, In re Shettle*, 260.

3. The certificate of registration of a deed of arrangement with creditors under the 192d section of The Bankruptcy Act, 1861, is only *prima facie* evidence of the fulfilment of the requisites of that section to which the certificate extends, and may be controverted without a separate proceeding to set it aside. — *Ex parte Page, In re Neal*, 283.

* 698 4. The registration of trust-deeds under the 192d and under the 194th sections of the Bankruptcy Act, 1861, although in practice * performed by

the same officer, are distinct, and have different operations; and where for the want of the papers required by the orders registration under the former section had been refused by the officer, and the applicant had registered the deed under the 194th section: *Held*, that the registration did not prevent the deed, which was an assignment of all the debtor's property, from being an act of bankruptcy.

The 192d section applies only to deeds which contain provisions for the benefit of all the debtor's creditors, and this requisite is not fulfilled by a deed the trusts of which are for the benefit of such of the debtor's creditors as shall execute the deed within a limited time.

Seemle, that a deed, to be entitled to the benefit of the provisions of the 192d section, need not comprise the whole of the debtor's property.

Seemle, also, that the creditors under a trust-deed are placed in *eodem statu* with creditors under a bankruptcy, and that as the latter cannot prove, without allowing for the value of their securities, the former are subjected to the same obligation. — *Ex parte Morgan and others, In re Woodhouse*, 288.

5. Trustees and creditors under a trust-deed operating under the Bankruptcy Act, 1861, § 192, and duly registered, are entitled to the same powers, rights, and privileges as are possessed by assignees and creditors under an adjudication in bankruptcy, including the power of summoning witnesses.

Seemle, that the jurisdiction of the Court of Bankruptcy to summon persons under the 197th section of the Act of 1849, for the purposes of discovery, should be exercised with care, circumspection, and judicial discretion, and not in a merely ministerial way. — *Ex parte Alexander, In re Thin and Flett's Trust-Deed*, 311.

6. A trust-deed for the benefit of creditors containing provisions for the application of the whole of the estate of the debtor in payment of his debts as in bankruptcy, contained a clause purporting to empower the trustee to pay or make such arrangements with the creditors whose debts were under 10*l.*, and to pay the costs, if any, of the creditors proceeding against the debtor for the recovery of their debts, as the trustee might deem expedient. *Held*, that the clause did not in either of its branches prevent the deed from binding non-assenting creditors under the Bankruptcy Act, 1861, § 192: not in the former branch, as it only purported to give a power which, being repugnant to the rest of the deed and the law, could not be exercised: nor in the latter, as that branch might afford the means of preserving the assets for equal distribution amongst the creditors.

Seemle, that the whole effect of the 197th section is to give to a trust-deed when duly registered a * comprehensive effect upon all the * 699 estate and effects of the debtor comprised in the deed, and the particular operation of making the position and relative rights of the trustees and creditors claiming under it the same as the rights of assignees and creditors under an adjudication in bankruptcy.

Seemle, also, that secured creditors under such a deed rank for the amount remaining after deduction of the value of their securities.

Seemle, also, that the words in the 197th section, "except where the deed shall expressly provide otherwise," refer to the insertion in the deed of a proviso for questions being settled by arbitration, or for the adoption of some different rule of administration from that adopted in bankruptcy, as, for example, with respect to joint and separate creditors. — *Ex parte Spyer, In re Josepchs*, 818.

7. The date of a trust-deed in the form set out in schedule D. to the Act of 1861, is that of the supposed adjudication to which the 197th section refers. — *Ex parte Mendel, In re Moor's Assignment*, 330.

8. A debtor conveyed property to a trustee upon trust to sell and pay to the encumbrancers (who were parties), and to the creditors parties thereto of the twelfth part, the sums due to them, but so that the trustees might apply the moneys from time to time in paying wholly or partially any one or more of the creditors in preference to any others; and it was declared that nothing contained in the deed should charge the property with any of the debts the payment of which was thereby intended to be provided for, or give to the creditors (other than the encumbrancers) any right of action or suit, lien, charge, or demand on account of any such debt upon or against the property, the debtor, or the trustee. C., a creditor, who was not an encumbrancer, executed the deed and received under it a payment on account of his debt. *Held*, reversing the decision of the Court below, that C. could maintain a suit for the execution of the trusts of the deed. — *Cosser v. Radford*, 585.

CONSOLIDATED ORDERS. See GENERAL ORDERS, 1, 2, 3.

CONSTRUCTION. See IMPLICATION. WILL, 1, 2, 3.

CONSTRUCTIVE FRAUD.

A young lady, entitled to a legacy of stock, was induced by the executors to execute a settlement, under which she and two trustees were to hold the stock upon trust for herself for life for her separate use, and after her death upon such trusts as she should by deed or will appoint, and in default of appointment upon trust for the persons who would have been entitled to it as her next of kin if she had * died possessed of it intestate and without having been married, with a proviso that the trustees on her request in writing should join with her in disposing of all or any part of the fund as she might direct. The young lady executed this settlement without any professional advice and without having had any communication on the subject except with the executors. The stock was transferred by the executors directly into the joint names of herself and the two trustees. She married about two months after. Upon her death her husband, as her administrator, filed a bill to set aside the settlement.

Held, that such a settlement made in such circumstances was not binding upon her, and that her administrator was entitled to have it set aside. — *Prideaux v. Lonsdale*, 438.

CONTRIBUTORY.

1. An action of debt brought against a company by one of its shareholders was compromised on the terms that he should receive a sum of money

from the company, and that his shares should be transferred to the managing director. The transfer was made, the consideration money being paid to the shareholder as part of a larger sum handed over to him from the funds of the company, and was entered in the books of the company and returned to the registration office. *Held*, that the above circumstances did not affect the shareholder with notice that the transferee was to hold the transferred shares for the company, the shareholder denying such notice.

Where a company has power to purchase shares, a particular formality only, such as the consent of a general meeting, being required to warrant the exercise of the power, and the company deals with a shareholder at arm's length, and takes from him and completes and enters in its books a transfer of shares, the Court is justified in inferring, as against the company, that the requisite formality had been antecedently supplied or subsequently added to the transaction. — *In re The British Provident, &c., Assurance Society, Grady's Case*, 488.

2. C. executed the deed of settlement of a company, which provided that no person should be entitled to the rights of a proprietor who should not have been previously accepted as such by the directors; that no person purchasing shares from the directors should be considered approved by the board as a proprietor until he should have paid down the price, and that upon his making such payment the board should cause his name to be entered in the register of shareholders as a proprietor; that every person who should subscribe for or take or purchase or acquire any shares should from the time of the entry of his name on the register as the proprietor be considered as a proprietor; * that every entry or alteration in the register should, as between *701 the company and the last proprietor, be binding; and that the register should, as between the company and every person claiming to be a proprietor, be conclusive evidence on behalf of the company to show whether he was a proprietor.

On an application of C. to be removed from the list of contributories, it appeared that the managing director, S., had induced C. to execute the deed on an agreement that he should be appointed one of the medical officers, and should not be removed except for misconduct. It further appeared that, after a correspondence as to this stipulation, C. insisted that his name should be erased from the list of shareholders and his subscription cancelled. S. finally engaged that the shares should be treated as forfeited, and assured C. that the company would treat his signature to the deed of settlement as a nullity. No entry relating to this transaction appeared in the company's books, except an entry in the minutes of a meeting of the directors after the execution of the deed, to the effect that 300 shares were allotted to C., who however never made nor was required to make any payment in respect of deposit or otherwise, nor received any communication whatever from the company until after an order had been made for winding it up.

Held —

1st. That the contract made between S. & C., even if binding in equity, which (*semble*) it was not, was not within the powers of the directors under the deed of settlement.

2dly. That C., notwithstanding his execution of the deed, never was a shareholder, nor had entered into a binding contract to become one.

3dly. That if C. was a shareholder, it was competent to an extraordinary board of directors to declare his shares forfeited, and *semble*, that that course would, under the circumstances of the case, have been assumed by the Court to have been taken, if it had been clear that C. had ever become a shareholder under the deed. — *In re The British Provident, &c., Assurance Society, Coleman's Case*, 495.

3. Where the deed of settlement of a joint-stock company provided that the directors should not be at liberty to purchase shares without the sanction of a general meeting previously obtained: *Held*, that it was sufficient if that sanction were obtained before the agreement was finally concluded, and that the directors might in the mean time treat and enter into a conditional contract for the purchase of shares.

Held, also, that such sanction might be inferred from conduct of the company.

- * 702 *Held*, also, that it is the duty of a company to keep exact minutes of what takes place at their general * meetings, and that if those minutes are not forthcoming, it must be assumed that, whatever ought in conformity with the antecedent proceedings of the directors to have been then submitted to the shareholders, was actually so submitted.

Held, also, that a company transferring shares previously transferred to them thereby ratify the former transfer, and that the circumstance of the shares bearing the same numbers is evidence of their identity.

Where directors had bought shares on behalf of a company in consideration of annuities to be paid by the company, part of whose business it was to grant annuities, and the annuities had been paid out of the funds of the company, and balance sheets of the accounts of the company had been prepared for the general meetings, *held*, that the company must be assumed to have assented to the purchase.

The 29th section of the 7 & 8 Vict. c. 110, which required the approval of the shareholders to contracts in which directors were interested: *Held*, not applicable to the case. — *In re The British Provident, &c. Assurance Society, Lane's Case*, 504.

CONVERSION.

A testator bequeathed his residuary personal estate, consisting partly of ships, to his sister B. (a married woman), subject to the legacy thereafter bequeathed to T. and the commission directed to be paid to him, and subject to the directions thereafter contained as to the conversion of ships. He appointed H. and T. his executors, and gave T. a legacy for his trouble, and directed his executors not to sell any of his ships for seven years from his death (unless the keeping them unsold should cause loss), and to work them, employing as much of his

residuary estate as should be necessary for that purpose, and he gave T. an allowance of 500*l.* a-year for his trouble while he should assist in managing them. By a codicil he stated that he still wished B. to have the residue, but directed that it should be invested in such manner as his executors should think fit, "in trust for her sole benefit during her lifetime," and that after her death it should be divided between her surviving children. *Held*, that the direction to keep the ships unsold for seven years was not revoked by the codicil, and that while they remained unsold B. took the actual income for her separate use. — *Green v. Britten*, 649.

COPYHOLDS. See **TENANT IN TAIL.**
COSTS.

1. The rule laid down in *Ex parte* the Bishop of London (2 De G., F. & J. 14), that the costs of the reinvestment of moneys paid into Court by several companies for lands taken by them under the * Lands * 703 Clauses Act ought to be borne by the companies in equal shares, except the costs of the *ad valorem* stamp on the conveyance, is to be followed in the absence of peculiar circumstances of hardship. — *In re Byron's Estate*, 358. *In re Merton College*, 361.
2. A mortgage debt having been paid off, the committees of the estate of the mortgagee, who had become lunatic, presented a petition, which they served upon the mortgagor, for an order enabling them to reconvey the mortgaged property. The costs of the mortgagor's appearance were directed to be paid by the petitioners and allowed to them out of the estate, with an intimation that for the future petitions of the kind ought not to be served upon mortgagors. — *In re Rowley*, 417.

See **PRACTICE**, 9. **WINDING-UP.**

COVENANT.

A father on the marriage of his son covenanted to give and bequeath by will to the son, or if he should die in the father's lifetime, leaving his wife surviving, then to the wife, the sum of 2500*l.*, to be held on the trusts of the settlement. The father died insolvent. *Held*, that the covenant was not to be construed as affecting only assets applicable to payment of legacies, but created a specialty debt against his estate.

The father by his will, reciting a power contained in his own marriage settlement of appointing a sum of 10,000*l.* among his children, which sum, in default of appointment, went to them equally, appointed 2500*l.* to the above-mentioned son "in full discharge" of the above covenant. About a year after the father's death this 2500*l.* was paid to the trustees of the son's marriage settlement by the son's direction, and several years afterwards he took from them an assignment of the benefit of the covenant. *Held*, that in the absence of evidence to show that the son directed the payment of the 2500*l.* to the trustees, with the intention of discharging the father's estate from its liability under the covenant, it was not so discharged. — *Graham v. Wickham*, 474.

CREDITORS. See **BANKRUPTCY.** **VESTING ORDER.**

CREDITORS (ASSIGNMENT TO). See **COMPOSITION DEED**, 7.

CREDITORS (COMPOSITION WITH). See COMPOSITION DEED.
 CREDITORS' REPRESENTATIVE. See WINDING-UP.
 CREDITORS (SEVERAL OR JOINT). See ADMINISTRATION OF ASSETS.

* 704 * DAMAGES. See BANKRUPTCY, 4. TRADE-MARK.

DEBT. See BANKRUPTCY, 4.

DEBTS (JOINT AND SEPARATE). See ADMINISTRATION OF ASSETS.

DEEDS. See PRIORITY.

DEMURRER. See PARTIES. PRACTICE, 2.

DIRECTORS. See JOINT-STOCK COMPANY.

DIRECTORS (PURCHASE OF SHARES BY). See CONTRIBUTORY, 1, 3.

DISENTAILING DEED. See TENANT IN TAIL.

DOCUMENTS. See PRACTICE, 5, 7.

DOCUMENTS (PRODUCTION OF). See PRACTICE, 5, 8.

DOMICILE. See SUCCESSION DUTY.

ELDEST SON.

By a settlement, a sum of money was directed to be raised after the death of the survivor of two persons, and be held in trust for all the children of the tenant for life of hereditaments settled by a contemporaneous deed other than and besides an eldest or only son for the time being entitled under the last-mentioned settlement to the estates thereby settled in possession or in remainder immediately expectant on the decease of the survivor of the tenant for life and a prior tenant for life. *Held*, that the exclusion applied only to the person who was the eldest son at the time appointed for raising the money, and that the representatives of an eldest son who had died before that period were entitled to participate in the money. — *Ellison v. Thomas*, 18.

ELECTION.

A testator was entitled to a moiety of two farms, T. and P., one-fourth of which belonged to L. J. and the remaining fourth to W. J. By his will he gave both farms to his wife for life, and after her death he gave T. to W. J. and E. J. in equal shares, with cross limitations between them, and P. to the plaintiffs. After the testator's death L. J. conveyed his interest in both farms to himself for life, remainder to the testator's widow for life, remainder to the plaintiffs in fee, and died in the widow's lifetime. After the widow's death W. J. elected to take against the will. *Held*, that one-fourth of T. belonged to W. J., another *fourth to the plaintiffs, another fourth to E. J., subject to the limitations over in favour of W. J., and that the estate and interest of W. J. in T. under the will ought to be apportioned between the plaintiffs and E. J. in proportion to the value of that interest of the plaintiff in P. and that interest of E. J. in T. of which they had been respectively deprived by W. J.'s election. — *Howells v. Jenkins*, 617.

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EQUITY TO A SETTLEMENT.

1. A husband and wife mortgaged in fee land of which they were seised in right of the wife, to whom the equity of redemption was reserved by the mortgage deed. The husband became bankrupt, and in the suit by the wife for a settlement of the equity of redemption on her and her children, and for redemption as against the mortgagee and for foreclosure against the assignees and the husband, the assignees disclaimed. *Held*, that the wife was entitled to redeem as against the mortgagee, and to have the whole fee settled upon herself and her children, the husband not objecting.

Form of decree in such a case.

Sturgis v. Champneys (5 Myl. & Cr. 97) not to be extended. — *Gleaves v. Paine*, 87.

2. A wife filed a bill against the trustee of a fund to which she was entitled and her husband to enforce her equity to a settlement. The defendant appeared, but before any further step had been taken in the cause the wife died. *Held*, that the fund was not so bound as to entitle her children to enforce their mother's equity to a settlement. — *Wallace v. Auldjo*, 643.

ESTATE TAIL. See **TENANT IN TAIL.**

EXECUTORY DEVISE.

Real estate was devised to a person in fee with a gift over in the event of his dying without leaving issue living at his death, and it was declared that he should not cut timber except for necessary repairs on pain of forfeiting his estate, and that if he did so the estate should go over. The devisee died without issue, having cut and sold timber. *Held*, that this restriction was legal, that the clause of forfeiture was only an additional means of securing its observance, and that the value of the timber could be claimed against the estate of the devisee.

The will directed the devisee during his life to keep certain renewable leaseholds fully estated with three lives, which leaseholds were subject to the same limitations as the real estate. *Held*, that the whole expense of renewals during the life of the first devisee was to be borne by him. — *Blake v. Peters*, 345.

*** EXONERATION.**

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A testator bequeathed his personal estate to trustees upon trust to pay thereout all his debts, funeral and testamentary expenses, and invest the residue upon the trusts therein mentioned, and he disposed of his real estate, part of which was subject to a mortgage. *Held*, that the trust for payment of all the testator's debts out of the personal estate took the case out of the operation of 17 & 18 Vict. c. 113, and that the mortgaged estate ought to be exonerated out of the personalty. — *Moore v. Moore*, 602.

FEME COVERTE. See **EQUITY TO A SETTLEMENT.** **HUSBAND AND WIFE. POWER, 1.**

FINES AND RECOVERIES. See **TENANT IN TAIL.**

FORFEITURE. See **EXECUTORY DEVISE.**

FORMALITIES. See **CONTRIBUTORY, 1.**

FRAUD.

J. S. and H. S., who were confidential agents of a company, conspired together to depress the selling price of the shares by a system of false accounts and concealment, in order that they might purchase them at an undervalue. By reason of this scheme, fifty-five shares belonging to G. were sold much below their real value, fifteen to J. S. and forty to H. S. The executor of G., upon discovering the frauds which had been practised, filed his bill against the executor of J. S. and the executors of H. S. for relief in respect of all the shares. The representative of J. S. demurred for want of equity and multifariousness. *Held*, that although J. S. derived no benefit from the sale of the forty shares at an undervalue, yet, as he stood in a fiduciary position towards the shareholders, and was a party to the fraud, he, as well as H. S., was liable to G. for the real value of the shares, and that his executor was a proper party to a suit in respect of them. *Held*, also, that as both sales were affected by the same fraud, it was not multifarious to combine the cases as to the fifteen and the forty shares in the same bill. — *Walsham v. Stainton*, 678.

See **CONSTRUCTIVE FRAUD. PARTIES.**

FRAUD ON POWER. See **POWER, 2.**

FRAUDULENT APPOINTMENT. See **POWER, 2.**

GENERAL ORDERS.

1. The 7th rule of the 10th of the Consolidated Orders, empowering
* 707 * the Court to order the service of a copy of a bill upon a defendant "in any suit" out of the jurisdiction, applies only to suits concerning land, stock, or shares within 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

Where it appears on the face of the bill that a defendant was, at the time of the institution of the suit, resident in a foreign country, and that the suit does not relate to any of the subjects in which this Court is warranted in exercising jurisdiction against persons so resident, he may demur to the jurisdiction, although he has not moved to discharge an order for service out of the jurisdiction, but has appeared to the bill. — *Cookney v. Anderson*, 365. *Samuel v. Rogers*, 396.

2. The language of the 7th rule of the 10th of the Consolidated Orders purporting to authorize the Court to order the service of a copy of a bill upon a defendant "in any suit" out of the jurisdiction, is in excess of the statutory authority under which the orders were made, and the operation of the rule must be confined to suits concerning lands, stock, or shares within the Statutes 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

Where the plaintiff had introduced into his bill statements as to the subject of the suit, bringing it within the last-mentioned statutes, and the

defendant, on an application to discharge an order for service abroad, had filed an affidavit to disprove the statements: *Held*, that the affidavit which had been rejected in the Court below ought to be received. — *Foley v. Maillardet*, 389.

3. A decree declared A. and B. to be entitled for their lives as tenants in common, with cross-remainders between them. Upon the death of A., which took place more than five years after the decree, one of the parties entitled in remainder applied for leave to appeal against the declaration as to cross-remainders. *Held*, that as the proper time for deciding whether there were cross-remainders had not arrived when the decree was made, leave to appeal ought to be granted. — *Walmsley v. Foxhall*, 451.

HEARING (AMENDMENT AT). See PRACTICE, 3.

HEIR-AT-LAW. See IMPLICATION.

HEIR-LOOMS. See PERPETUITY.

HOTCHPOT. See ADVANCES.

HUSBAND AND WIFE.

A mere devise to a woman for her sole use and benefit does not sufficiently indicate an intention to limit the devised property to her separate use. — *Gilbert v. Lewis*, 38.

See EQUITY TO A SETTLEMENT. * CONVERSION.

* IMPLICATION.

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The words in a will "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property situate in the parish of M.," *held* to be an effectual gift to N., who was in fact neither heir nor next of kin of the testator. — *Parker v. Nickson*, 177.

INJUNCTION. See TRADE-MARK.

INSURANCE. See POLICY.

ISSUE.

In order to bring a case within the proviso contained in the 25th & 26th Vict. c. 42, § 2, authorizing the Court of Chancery, notwithstanding the Act, whenever it shall appear that a question of fact may be more conveniently tried by a jury at the assizes, or at any sitting in London or Middlesex for the trial of issues in the Superior Courts of Common Law, to direct such trial, the Court of Chancery must be satisfied that the administration of justice in the particular case may be more conveniently exercised and promoted by directing such issues, than by completing the hearing and the inquiry before itself. — *Young v. Fernie*, 353.

JOINT CREDITOR. See ADMINISTRATION OF ASSETS.

JOINT-STOCK COMPANY.

The deed of settlement of a joint-stock insurance company empowered a gen-

eral meeting to elect and remove directors, audit accounts, and to determine upon any question, matter, or thing relating to the affairs of the company which should arise in the management or conduct thereof. It also empowered the directors to alter or rescind or abandon any contract entered into on behalf of the company, and to institute, abandon, and compromise actions and suits, and generally, where the deed was silent, to act in the direction of the concerns of the company in such manner as at their absolute discretion they should think most conducive to the interests of the society, and for that purpose to make, do, and execute all such acts, deeds, matters and things whatsoever as might be requisite or expedient in that behalf. The directors purchased the business and undertook to pay the debts of another insurance company, and the purchase was approved of at a general meeting, and was carried into effect by a purchase-deed, in which the purchasing company took covenants from the directors of the selling company, and not from the company itself, for the title. The purchasing company took the business of the selling company, and carried it on till nearly a year after the execution of the deed of purchase, when both companies were ordered * to be wound up under the winding-up Acts.

* 709 *Held, —*

1. That the purchase of the business was not beyond the power of the purchasing company, and that therefore the engagement to pay the debts of the selling company, being part of the terms of the purchase, was not beyond those powers.

2. That, under the circumstances, the purchasing company could not prove against the selling company for moneys paid by them in respect of the debts of the selling company on the ground that the sale was void, and that for this purpose it was immaterial whether the sale was beyond the powers of the selling company or not.

3. *Semble*, that the change of the position of the selling company owing to the sale prevented the parties being restored to their original position, and that the moneys in question could not be recovered. — *Era Company's Case*, 29.

See CONTRIBUTORY, 1.

JUDGMENT DEBT.

The 25th section of "The Probate Court Act" (20 & 21 Vict. c. 77), enacting that the Court shall have the like powers for enforcing its orders as are vested in the Court of Chancery in relation to suits depending therein, does not constitute an order of the Probate Court for payment of money a charge on land within the 1 & 2 Vict. c. 110, § 13. — *Pratt v. Bull*, 141.

JURISDICTION (SERVICE OUT OF). See GENERAL ORDERS, 1, 2. PRACTICE, 4.

KIN (NEXT OF). See IMPLICATION.

LANDS CLAUSES ACT. See COSTS, 1.

LEGACY (COVENANT TO BEQUEATH). See COVENANT.

LEGACY DUTY. See SUCCESSION DUTY.

LIMITATIONS (STATUTE OF).

1. A testator by his will charged all his real estate with payment of his debts, if his personal estate was insufficient to pay them, and directed his executors to raise sufficient for their payment by mortgage or otherwise. *Held*, that this did not create an express trust within the exception contained in the Statute of Limitations, 3 & 4 Will. 4, c. 27.

An acknowledgment by a devisee does not prevent his co-devisee from pleading the statute.

It is sufficient to plead the 3 & 4 Will. 4, c. 27, to a bill seeking the benefit of a trust without also pleading the Statute 3 & 4 Will. 4, c. 42. — *Dickenson v. Teasdale*, 52.

- * 2. An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a puisne mortgagee from relying on the Statute of Limitations.

Therefore where the mortgagor was, but a second mortgagee was not, a party to a transfer of a first mortgage, the interest on which was, and was in the transfer recited to be, upwards of six years in arrear: *Held*, that notwithstanding this recital, the second mortgagee was entitled to redeem the first mortgagee on payment of principal and six years' arrears only of interest. — *Bolding v. Lane*, 122.

LOCKE KING'S ACT. See EXONERATION.

LUNACY.

1. An application of a lunatic for a *supersedeas* of the commission of lunacy, on the ground of his recovery, will not be at once granted on evidence of the lunatic no longer exhibiting unsoundness of mind, but will be ordered to stand over until it can be seen what will be the effect of removing the restraint imposed by the existence of the commission. — *In re Blackmore*, 84.
2. Form of order enabling the administrator of a deceased lunatic's estate to enforce against a defaulting committee of the estate and his sureties the bond to the Crown entered into by them on his appointment. — *In re Hill*, 487.

See PARTITION.

LUNATIC.

Proof allowed against the estate of a testator for money advanced to his wife during his lunacy, and applied by her in payment of her necessary expenses, though she had a separate income. — *In re Wood's Estate*, 465.

MAINTENANCE. See LUNATIC.

MARRIED WOMAN. See EQUITY TO A SETTLEMENT. HUSBAND AND WIFE. POWER, 1.

MORTGAGE. See EXONERATION. LIMITATIONS (STATUTE OF), 2. PRIORITY.

MORTGAGOR AND MORTGAGEE. See COSTS, 2.

MULTIFARIOUSNESS. See FRAUD.

NEGLIGENCE. See PRIORITY.

NEXT OF KIN. See IMPLICATION.

*711 *PARENT AND CHILD. See ADVANCES.
PARTIES.

A bankrupt who has been engaged in a fraudulent transaction may be made a party to a bill for discovery, but if the discovery is ancillary to relief improperly sought against him, he may demur, and the delivery up of documents which the bankrupt only holds for his assignees is not relief in respect of which it is necessary to make him a party. — *Gilbert v. Lewis*, 38.

PARTITION.

A decree having been made for partition of lands, an undivided share in which was vested in a lunatic as tenant in tail, an order was made in lunacy and in chancery directing the committee to execute all necessary assurances for giving effect to the partition. — *In re Sherard*, 421.

PARTNERSHIP.

1. The two defendants, who carried on business in partnership as ship and insurance brokers, and the plaintiff who carried on business alone as a merchant and commission agent, jointly agreed to supply arms to a foreign government. In the first contract with that government, the defendants were described only by their partnership name, and it was signed on their behalf in that name. The second contract was signed by an agent of the plaintiff and defendants, who was described in it as acting on behalf of the defendants (giving only the name of the firm) and the plaintiff, and as "agent of the two houses above named." *Held*, reversing the decision of the Court below, that on the form of these contracts in the absence of evidence to the contrary, the adventure must be considered to have been undertaken by the defendants as one person and the plaintiff as another person, and not by the three as individuals, and that the plaintiff was entitled to a moiety of the profits. — *Warner v. Smith*, 337.

2. Where a partnership for a term is continued after its expiration without express renewal, although the assumption is that it is continued on the same general footing as before, this only extends to such of the stipulations in the original articles as are properly applicable to the new contract. And where one of the articles of a partnership for a term provided that either partner might, in the event of specified conduct on the part of the other, dissolve the partnership by notice, and that the latter partner should, in that event, be considered as quitting the business for the benefit of the former, this article was held not properly applicable to a continuation of the partnership after the expiration of the term without any agreement for renewal. — *Clark v. Leach*, 409.

PENALTY.

A debt being payable by instalments, with interest, the debtor made de-
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fault * in payment of one of the instalments. By a deed, reciting that the creditor had agreed to give the debtor time upon having the payment of the debt secured to him, with interest, "by the instalments and in manner thereafter appearing," provision was made for payment of the debt with interest, by instalments different from the former ones, with a proviso that upon default being made in payment of any instalment the whole unpaid portion of the debt, with interest, should become immediately payable. The debtor made default. *Held*, that the proviso was not in the nature of a penalty, and that a Court of Equity ought not to restrain the creditor from enforcing immediate payment of the whole moneys remaining due. — *Sterne v. Beck*, 595.

PERPETUITY.

A testator devised lands in trust for the use of the second son of a brother for life, with remainder to the use of his first and other sons successively in tail male, with successive limitations in remainder for life, and to the first and other sons of the successive tenants for life in tail male; and he bequeathed his residuary personal estate upon such trusts as were thereby declared concerning the devised lands, or as near thereto as the rules of law and equity would admit, but so that no part thereof should vest absolutely in any tenant in tail unless he attained twenty-one. *Held*, that the trust of the personalty was not void for remoteness. — *Gosling v. Gosling*, 1.

See **WILL**, 1.

PLANS.

On the plans deposited by the promoters of a railway with the clerk of the peace, a bridge by which it was proposed to carry the line across a certain turnpike road was described as having a span of forty-five feet. *Held*, that under the 13th section of the Railway Clauses Consolidation Act, 1845, which enacts that where it is intended to carry the railway on an arch as marked on the plan, "the same shall be made accordingly," the company were bound to make an arch conformable to the description in the plan, and were not at liberty to build it with a span of only thirty-five feet.

Per the Lord Justice TURNER. — The bridge was an "engineering work" within the meaning of the 14th section of the Railway Clauses Act, and the company were by that section debarred from making it otherwise than according to the description in the plan. — *The Attorney-General v. The Tewkesbury and Malvern Railway Company*, 423.

PLEADING. See **LIMITATIONS (STATUTE OF)**, 1.

POLICY OF INSURANCE.

By the policies of an insurance company * it was declared that the stock * 713 and funds of the company should be subject and liable to pay the sum assured, with a proviso that the stock and funds of the company should be alone liable, and that no member of the company should be individually liable beyond the amount of his share in the capital stock. *Held*, that these policies did not give the assured a charge on the funds of the company so as to entitle them to priority over its general creditors. — *Re The State Fire Insurance Company*, 634.

POWER.

1. The 8th section of the Wills Act (1 Vict. c. 26), providing that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of the Act, does not exclude the wills of married women from the operation of the 24th section, as to a will speaking as if executed immediately before the testator's death, or of the 27th, as to a general gift being an execution of a power.

Semble, that a general testamentary power given to two persons, or the survivor, of appointing an equitable estate, may be well exercised in the lifetime of both by that one who proves to be the survivor. — *Thomas v. Jones*, 63.

2. The donee of a power of appointing portions among his younger children appointed a double share to a younger child without previous communication with him. But it appeared from the instructions for the appointment, that its purpose as to half of the double share was, that it should be held in trust, and the income accumulated during the life of the appointee and twenty-one years afterwards, or until the successor to the title of the appointor should direct the half of the double share and accumulations to be paid to another child who had been excluded by reason of an intended marriage disliked by the appointor. In the absence of such direction the half of the double share and accumulations were intended to be paid to the appointee. The appointee soon after the appointment executed a deed settling the moiety accordingly. *Held*, —

1. That if the appointment and subsequent settlement could be held to be one transaction, the provisions for accumulation, and for the control of the appointor's successor in title over the appointed fund, could not be rejected as mere excess, so as to give the moiety to the excluded child.
2. That the purpose of the appointment as to the moiety, although uncommunicated, vitiated it as to that portion, but as to that portion only.

A settlor intending to exclude one of his children from a settled annuity in the event of an intended and disapproved-of marriage, unless the settlor's successor in title *should otherwise direct, gave instructions to that effect for a settlement, which was prepared so as to vest the annuity in trustees in trust to pay it to the child and her sister, or either of them, to the exclusion of the other, in such shares as the successor to his title should appoint, and subject thereto to the two children equally. The successor first appointed one year's annuity to the sister without any previous communication with her, and afterwards caused to be prepared for her signature an order to her bankers directing them to carry a moiety to a trust account. She signed the order, and afterwards the successor appointed to her the whole annuity, which continued to be paid over to the trust fund under the same order. *Held*, that the appointment was a fraud on the power, and that the

intention of the donor of the power could only be collected from the deed creating it.

A title cannot be derived under a fraud upon a power in the absence of valuable consideration.

In considering whether or not a particular appointment is a fraud upon the power, although the motive with which the power was exercised may not be regarded, the purpose may.

The rights of the persons entitled in default of appointment under a power can be defeated only by its *bond fide* exercise.

The general rule laid down in *Daubeny v. Cockburn* (1 Meriv. 626), that where an appointment is made for a bad purpose the bad purpose affects the whole appointment, does not apply to cases in which the evidence enables the Court to distinguish what is attributable to an authorized from what is attributable to an unauthorized purpose. — *Topham v. The Duke of Portland*, 517.

See SUCCESSION DUTY.

POWERS OF DIRECTORS. See JOINT-STOCK COMPANY.
PRACTICE.

1. Persons brought before the Court under the 15 & 16 Vict. c. 86, § 42, r. 8, are entitled to present petitions of rehearing, *semble*. — *Ellison v. Thomas*, 18.
2. Where a married woman sues by her next friend, a demurrer *ore tenus* to the constitution of the suit, on the ground that the property in question was not limited to her separate use, cannot be taken when there is a demurrer on the record to part of the bill only. — *Gilbert v. Lewis*, 38.
3. A land-owner agreed to sell land to a railway company, and the company agreed to make such crossings as the land-owner's surveyor should, within one month after the company took possession, direct in writing. No award was made by the surveyor until about two months after possession had been taken. The company having refused to make some crossings directed by the award the land-owner * filed his * 715 bill, alleging conduct on the part of the company amounting to a waiver of the limitation of the time for making the award, insisting on the direction of the surveyor as binding, and praying that the company might be decreed to make the works directed by it, but not distinctly putting forward any case for specific performance of the agreement independently of the award. The Court being of opinion that the award was not binding upon the company, and that the title to relief independently of the award was not put forward with sufficient distinctness to make it right to give relief on that footing, gave the plaintiff leave to withdraw replication and amend his bill by putting in issue any claim founded on the original agreement. — *Lord Darnley v. The London, Chatham, and Dover Railway Company*, 204.
4. Leave given to serve an administration summons (relating to stock and shares in England) on a defendant abroad. — *In re Emile Alcan, deceased*; *Cohen v. Alcan*, 398.
5. Where, in the course of prosecution of an administration decree in Cham-

- bers, the Judge heard personally and refused an application of a creditor for an order requiring executors to make an affidavit as to the possession of documents, and also refused to adjourn the application into Court: *Held*, not a proper case for an appeal directly from Chambers.
- A person having come in to prove as a creditor under a common decree for the administration of assets, and having produced *prima facie* evidence in support of his claim, an order was made upon his application directing the executors to file an affidavit as to their possession of documents relating to the claim or to any item in it. — *In re John M'Veagh, deceased; M'Veagh v. Croall*, 399.
6. An appeal lies directly from an order of the Judge in Chambers as to production of documents before a decree is made, where the Judge makes the order in person and declines to adjourn the matter into Court to be argued by Counsel. — *Snowdon v. The Metropolitan Railway Company*, 408.
7. A defendant, against whom a decree for an account was made, had before decree made full discovery by answer as to documents in his possession. *Held*, nevertheless, that the plaintiff after decree was entitled to call for an affidavit as to his possession of any documents other than those mentioned in his answer relating to the matters in question. — *Handlip v. Kitton*, 440.
8. Where a case is made out, raising a reasonable suspicion that a defendant who has made an affidavit as to documents has in his possession
- * 716 * other documents relating to the matters in question and not disclosed by the first affidavit, the Court may order him to make a further affidavit, although the first is sufficient in point of form.
- A defendant who had filed an affidavit as to documents was ordered to file a further affidavit. After this order had been made, but before any further affidavit had been filed, he applied for an affidavit as to documents in the possession of the plaintiffs, the time for excepting to his answer having expired, and the plaintiffs were ordered to make such affidavit. *Semble*, that this order was correct. — *Noel v. Noel*, 468.
9. The costs of an application to stay the execution of a decree pending an appeal to the House of Lords are to be paid by the applicant. — *Lady Mary Topham v. Duke of Portland*, 608.

See GENERAL ORDERS, 1, 2, 3.

PRIORITY.

A sum of 135,000*l.* was advanced to B. on mortgage in the name of S., who at the same time executed three declarations of trust, by which he declared that he held the mortgage on trust as to 105,000*l.* for E., as to 5,000*l.* for W., and as to 10,000*l.* for N., the rest of the money belonging to himself. N. was the solicitor both of E. and S., and was intrusted by E. with the investment of the 105,000*l.* E. appeared to have trusted to N., and to have made no inquiries as to the precise mode of investment, and it did not appear that he knew of the existence of the declaration of trust in his favour. He denied having known that the security was not taken in his own name, and it was not shown

that he had any actual notice that it was not. S. afterwards transferred the mortgage for value to C., who had no notice of the trust, and delivered the deed to him. The legal estate in the mortgaged property was during the whole of the transactions outstanding. *Held*, that E., assuming him to have known S. to be his trustee, was not bound to make any inquiry into the acts or conduct of S. with regard to the security, and that his trusting to N. and omitting to make any inquiry as to the person in whom the mortgage was vested or in whose possession it was, were not sufficient grounds for depriving him, as against C., of the benefit of the prior equitable title obtained by the declaration of trust, and that C.'s possession of the mortgage-deed being obtained through a breach of an express trust on the part of S. did not alter the case, and that in the absence of evidence that E. had notice of the dealings of S. with the security, E. was entitled to priority over C. — *Cory v. Eyre*, 149.

See POLICY OF INSURANCE.

PROBATE COURT ACT. See JUDGMENT DEBT.

* PRODUCTION OF DOCUMENTS. See PRACTICE, 5, 7, 8.

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PROOF OF DEBT. See BANKRUPTCY, 4.

PROOF OF DEBTS. See ADMINISTRATION OF ASSETS.

RAILWAY CLAUSES ACT, 1845. See PLANS.

REDEMPTION. See LIMITATIONS (STATUTE OF), 2.

REHEARING. See PRACTICE, 1.

REMOTENESS. See PERPETUITY. WILL, 1.

RENEWAL. See EXECUTORY DEVISE.

REPLICATION (WITHDRAWING). See PRACTICE, 3.

RETAINER. See SET-OFF.

ROLT'S ACT. See ISSUE.

SALE (BY JOINT-STOCK COMPANY). See JOINT-STOCK COMPANY.

SEPARATE CREDITORS. See ADMINISTRATION OF ASSETS.

SEPARATE USE. See HUSBAND AND WIFE.

SERVICE, OUT OF THE JURISDICTION. See GENERAL ORDERS, 1, 2.
PRACTICE, 4.

SET-OFF.

A testator bequeathed his residuary personal estate to his daughter. The daughter survived him several years, and bequeathed her residuary estate to her six children. One of her sons, who owed the testator 1400*l.*, became bankrupt some time after her death. It had been ascertained before the bankruptcy that the testator's estate yielded a clear residue exclusive of the 1400*l.* *Held*, that the executors of the daughter were entitled to retain the 1400*l.* out of the son's share in his mother's estate. — *Bousfield v. Lawford*, 459.

SETTLEMENT. See CONSTRUCTIVE FRAUD. EQUITY TO A SETTLEMENT.
ELDEST SON.

SHAREHOLDERS. See CONTRIBUTORY, 1, 2.

SHAREHOLDERS (APPROVAL BY). See CONTRIBUTORY, 3.

* 718 * SOLICITOR. See TAXATION.

STATUTES.

3 & 4 Will. 4, c. 27 (Limitations). See LIMITATIONS (STATUTE OF).

6 & 7 Will. 4, c. 74 (Fines and Recoveries). See TENANT IN TAIL.

1 Vict. c. 26 (Wills Act). See POWER, 1.

1 & 2 Vict. c. 110 (Judgments). See JUDGMENTS.

7 & 8 Vict. c. 110 (Joint-stock Companies). See CONTRIBUTORY, 3.

8 & 9 Vict. c. 18 (Lands Clauses Act). See COSTS, 1.

8 & 9 Vict. c. 20 (Railway Clauses Act). See PLANS.

13 & 14 Vict. c. 60 (Trustee Act, 1850). See VESTING ORDER.

16 & 17 Vict. c. 51 (Succession Duty Act). See SUCCESSION DUTY.

17 & 18 Vict. c. 113 (Locke King's Act). See EXONERATION.

20 & 21 Vict. c. 77 (Probate Court). See JUDGMENT DEBT.

24 & 25 Vict. c. 134 (Bankruptcy Act, 1861). See BANKRUPTCY, 2, 3.

COMPOSITION DEED, 1, 2, 3, 4, 5, 6, 7.

25 & 26 Vict. c. 42 (Rolt's Act). See ISSUE.

STAYING PROCEEDINGS (PENDING APPEAL). See PRACTICE, 9.

SUCCESSION DUTY.

An English testator by will gave a fund to trustees upon trust to pay the income to his daughter for life, and after her death to hold the fund in trust for such persons as the daughter should by will appoint. The daughter for some time previous to and up to her decease was domiciled in Jersey. She disposed of the fund by will, giving legacies to two persons and the residue to her husband. *Held*, that the legacies were liable to duty. *Per* the Lord Justice TURNER. — The legacies by reason of the domicile in Jersey were not liable to legacy duty, but notwithstanding the fact of such domicile were liable to succession duty. — *Re Wallop's Trusts*, 656.

SUPERSEDEAS. See LUNACY, 1.

SURVIVORS. See WILL, 3.

TAXATION OF SOLICITOR'S BILL.

On the day fixed for the completion, at a solicitor's office, of the sale of a mortgaged property belonging to a former client, the *solicitor delivered to the former client, who was in somewhat embarrassed circumstances, his bill of costs. The client and his new solicitor attended, and in order to prevent the postponement of the completion, allowed the solicitor to retain the amount of his bill, but under protest. The bill contained overcharges to a considerable amount. *Held*, that the bill was paid under circumstances of pressure, and that taxation ought to be ordered. — *Re Pugh, Ex parte Briscoe*, 673.

TENANT FOR LIFE. See CONVERSION.

TENANT IN TAIL.

A deed for barring an equitable estate tail in copyholds is void as against

the issue in tail if it is not entered on the rolls of the manor within six calendar months after its execution.

Account of rents directed at the suit of the issue in tail for six years previous to the filing of the bill. — *Gibbons v. Snape*, 621.

See PARTITION.

TIMBER. See EXECUTORY DEVISE.

TIME (FOR APPEAL). See GENERAL ORDERS, 3.

TITLE-DEEDS. See PRIORITY.

TRADE-MARK.

If A. has acquired property in a trade-mark, which is afterwards used by B. in ignorance of A.'s right, A. is entitled to an injunction, but not to an account or compensation, except in respect of any user by B. after he became aware of the prior ownership.

The owner of a trade-mark will not be deprived of remedy in equity, even if it be shown that all who bought goods bearing the trade-mark from the defendant were well aware that the goods were not of the plaintiff's manufacture. It is enough if the goods were supplied by the defendant for the purpose of being sold again in the market, nor is it necessary to show that any person was deceived, if the resemblance of the articles is such as would be likely to cause one mark to be mistaken for the other.

Where the plaintiff attached to wire manufactured by him tallies marked with an anchor, and the defendant attached to his manufacture similar tallies marked with the device of a crown and anchor: *Held*, that the plaintiff was entitled to an injunction.

Negotiations antecedent to a suit (save in case of bad faith), unless amounting to a release or binding agreement, cannot be regarded. — *Edelsten v. Edelsten*, 185.

TRIAL AT LAW. See ISSUE.

* **TRUST.** See COMPOSITION DEED, 8.

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TRUSTEE. See ACQUIESCENCE. PRIORITY.

TRUSTEE ACT, 1850. See VESTING ORDER.

ULTRA VIRES. See CONTRIBUTORY, 2. JOINT-STOCK COMPANY.

UNCERTAINTY. See WILL, 1.

UNLIQUIDATED DAMAGES. See BANKRUPTCY, 4.

VESTING ORDER.

Creditors who have obtained a decree for the administration of the estate of their deceased debtor, under which a contract for sale of his real estate has been entered into and the purchase-money paid into Court, are persons "beneficially interested" in the lands comprised in the contract within the scope of the Trustee Act, 1850, § 37, and entitled to apply thereunder. — *In re Wragg*, 356.

See COSTS, 2.

VOLUNTARY SETTLEMENT. See CONSTRUCTIVE FRAUD.

VOLUNTARY TRUST. See COMPOSITION DEED, 8.

WASTE. See EXECUTORY DEVISE.

WIFE. See EQUITY TO A SETTLEMENT. HUSBAND AND WIFE. POWER, 1.

WILL.

1. A testator directed that "the annual interest only" of the residue of his property, of whatever kind, should be divided into as many equal parts as there might be children of W., share and share alike, as each of the said children should come of age, and that in case any one of the said children should die without any children, then and in that case his or her share of the said annual interest should devolve to the surviving children, share and share alike, and so on successively until the whole amount of the said interest of the said residue should come into the hands of the grandchildren and great-grandchildren of W.

Held, that the children took immediate interests for life, and that there was no intestacy by reason either of incomplete disposition or of uncertainty or remoteness. — *Wetherell v. Wetherell*, 134.

- * 721 2. A testator bequeathed to his wife 4000*l.* to be used for her own and the children's benefit as she should * think best, recommending her not to diminish the principal but vest it in government or freehold securities. There being two children, one adult, and the other a minor, the widow made an appointment of 500*l.* to the minor and of the residue to the adult; and she and the adult child petitioned for payment out of Court of the residue. *Held*, affirming a decision of the Master of the Rolls, that such payment could not be ordered. — *Hart v. Tribe*, 418.

3. A testatrix devised real estate to her nephews A., B., and C. for their respective lives, share and share alike, and after the death of each or any of them his share to go to his first and other sons successively in tail male, with remainder to his daughters as tenants in common in tail, and in default of such issue "to such of my said nephews as shall survive and to their and his issue in the manner hereinbefore mentioned; and in case of the death of all my said nephews and their issue, I devise my said estate to my right heirs."

A. died, leaving a son; B. died next, without issue; C. died last, leaving a son. *Held*, reversing the decision of the Court below, that B.'s share did not belong to C.'s son alone, but to A.'s son and C.'s son in moieties. — *In re Tharp's Estate*, 453.

4. A testator gave legacies to his children absolutely, and then gave the income of his residuary estate to his wife for her life, and directed that after her death the income should be divided equally among his said children during their respective lives, and after the death of all his children he directed the capital to be divided equally among all his grandchildren; provided, nevertheless, that in case of the death of any of his said children, leaving lawful issue, "the respective legacy, share,

and interest" of the child or children so dying should immediately thereupon become vested in such his, her, or their issue respectively. *Held*, that upon the death of a child leaving issue before the period of distribution the income of that share of the residue of which the child had been tenant for life was payable until the period of distribution to the issue as joint tenants, and not to the surviving children of the testator. — *Walmsley v. Foxhall*, 605.

See ADVANCES. CONVERSION. EXECUTORY DEVISE. IMPLICATION.
WILLS ACT (1 VICT. c. 26). See POWER, 1.
WINDING-UP.

A motion to have a claim for a large debt allowed against a company in course of being wound up having been successfully made, the Vice-Chancellor declined to certify that the case was a proper case for the appearance of the creditors' representative by counsel, and on appeal * a motion to have the costs of his appearing by counsel * 722 set allowed was refused.

Per the Lord Justice TURNER. — As a general rule, the creditors' representative ought not to appear on applications in which the contributories and creditors have a common interest, where the interest of the contributories is as great as that of the creditors. — *In re The Era Life and Fire Assurance Company*, 172.

See CONTRIBUTORY, 1, 2, 3.

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END OF THE FIRST VOLUME.



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